

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 75-7474

In The  
**United States Court of Appeals**  
For The Second Circuit

JANUARY MUSIC CORPORATION, ARCH MUSIC CO.,  
INC., and SEALARK ENTERPRISES, INC.,

*Plaintiffs-Appellees,*

vs.

MUSICOR RECORD CORP., et als,

*Defendants,*

and

MUSICOR RECORD CORP. and TALMADGE PRODUC-  
TIONS CO., INC.,

*Defendants-Appellants.*

## JOINT APPENDIX

Volume II, pp. 301a - 600a

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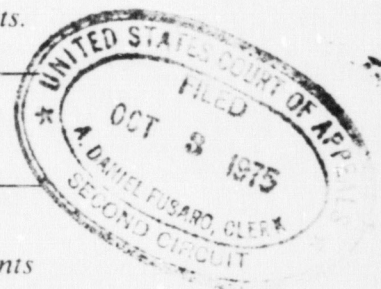
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Berman-cross

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THE COURT: That is why I was puzzled. You said they will decrease. I think they would eliminate the reserve.

A I have to give you a little background on that, if I may.

The Harry Fox Agency does not represent 100 per cent of publishers. They will go into a record company and find that this record company has held X dollars of reserves. Based upon the Harry Fox percentage of publishers represented they would take a claim of perhaps 65 per cent of that reserve. If they were aware that certain of the licenses had been issued on records manufactured and sold, instead of taking a normal 65 per cent they would probably increase it to 70 per cent or 75 per cent to take care of the extra reserve that should have been claimed.

Q The Court's question, it is my question to you, if Musicor is liable on a manufactured basis it just does not mean a darn whether they sold the records or not, is that right?

A Yes.

Q They are stuck the minute that record comes off the press?

A Yes.



pgbr

Berman-cross

Q So the question as to a reserve under a manu-  
factured license, there is no such thing as a reserve against  
returns on a manufactured royalty license only, is there?

A That is right.

Q Isn't it a fact -- and I am referring now as a  
starting point to the first audit you conducted -- at the  
time you conducted the first audit you were acting as  
agents for Arch, January and Sealark and Pitfield, is that  
correct?

A Yes.

Q Isn't it a fact that in the course of this audit  
all of the records covered by the licenses we have been  
talking about were treated on a manufactured and sold  
basis and isn't it a fact that your office raised the  
dickens on the question of a "excessive reserve" being  
maintained on these very records by the Musicor Company  
which reserve you suggested should be reduced. I am going  
to show you. This paragraph, right here, and I am referring,  
your Honor, to Exhibit 10-A.

THE COURT: It is just 10.

MR. COHN: This is the report on the first audit.  
I am referring you --

MR. PICH: Referring to the report of Prager &  
Fenton.



pgbr

Berman-cross

(242)

MR. COHN: Right. Attached to a letter from Harry Fox addressed to the defendant, in this case Musicor, and I would call your attention to a paragraph.

[Q I call your attention to a paragraph entitled "Reserves" and under applied credits I ask you whether or not that paragraph does not refresh your recollection that the Prager & Fenton audit gave great attention to reserves in the case of January, Sealark, Arch and Pitfield and that your agency raised the dickens, so to speak, with Musicor for maintaining excessive reserves based upon the returns, records and royalty payments.

A Yes. The audit does specifically make an issue of the reserves held for the Arch group.]

[Q Mr. Berman, based upon your experience and expertise would it be fair to say that custom and usage in the trade would provide for licenses in a situation such as we have in this case between Schroeder and Musicor on a manufactured and sold basis rather than a manufactured basis?

A It depends on the instructions from the publisher.

Q I was asking you based upon custom and usage in the industry.

A Normally licenses are issued on the basis of records manufactured and sold.]

Q That is what I was asking.

1 pgbr

Berman-cross-redirect

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2 MR. COHN: have no further questions of this  
3 witness.

4 THE COURT: Do you have any redirect, Mr. Rich?

5 MR. COHN: I renew my objection.

6 MR. RICH: Yes, I do.

7 THE COURT: I will reserve on your objection for  
8 the moment.

9 REDIRECT EXAMINATION

10 BY MR. RICH:

11 Q Did you have any conversations with anyone on be-  
12 half of the plaintiffs with regard to the licenses providing  
13 that it be issued on the basis of royalties and repaid on  
14 records manufactured rather than manufactured and sold?

15 A Yes.

16 Q Based on these conversations is that why the licenses  
17 issued by your organization, Harry Fox Agency, provided in  
18 most cases except for those 8 licenses for records manufactured  
19 rather than royalties repaid on the basis of records  
20 manufactured and sold?

21 A Yes.

22 Q Did Musicor or any of its representatives ever  
23 state to the Harry Fox Agency to your knowledge before today  
24 that the licenses that were issued by the Harry Fox Agency  
25 to Musicor were incorrect in any way?



pgbr

Berman-redirect

244

1  
2 A No.

3 Q Did they ever claim before today that an  
4 unauthorized person signed the license on their behalf?

5 A No.

6 Q Did they ever claim before today that although they  
7 returned the license signed on behalf of Musicor somehow they  
8 were improper licenses or that the licenses should never  
9 have been issued because of something to do with United  
10 Artists or anything else?

11 MR. COHN: I object, your Honor. Was it ever  
12 claimed before today? That should be limited to this  
13 witness' knowledge, was it ever claimed or was it ever claimed  
14 to him or the Harry Fox office?

15 THE COURT: That is implicit. Was it ever claimed  
16 to you?

17 THE WITNESS: No.

18 Q Mr. Berman, your position with the Harry Fox  
19 agency going back through the end of 1964, toward the end  
20 of 1964, the time these licenses were issued, if Musicor  
21 ever complained about these licenses or in any way stated  
22 that although they returned the licenses that the licenses  
23 should not apply to them, would you have known in your  
24 capacity with the Harry Fox Agency about such a complaint  
25 on the part of Musicor?

pgbr

Berman-redirect

245

1  
2 MR. COHN: I will object to that unless it is  
3 limited to: Would you have known if such a complaint was  
4 made to your agency?

5 THE COURT: I think we will have to accept that  
6 limitation.

7 A Yes.

8 THE COURT: We are not talking about a claim made  
9 in this litigation. That is irrelevant to his knowl-  
10 edge.

11 MR. RICH: That is right.

12 Q So if any complaints about the licenses were  
13 made to anybody in the Harry Fox Agency this would have  
14 been called to your attention?

15 A Yes.

16 Q Was it ever called to your attention?

17 A No.

18 Q Do you have any knowledge at all of any complaint  
19 about these licenses which you say were issued by your  
20 agency to Musicor and returned by Musicor to the Harry Fox  
21 Agency?

22 A No.

23 Q Did Musicor ever advise you or the Harry Fox  
24 Agency that while the licenses that were issued provided for  
25 a 2 cent royalty that the royalty was actually a penny and



pgbr

Berman-redirect

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a half or some other figure?

A No.

Q Did Musicor ever advise you or the Harry Fox Agency that whereas licenses provided for a royalty to be paid on the basis of records manufactured that they should have provided for the payment of a royalty on the basis of records manufactured and sold?

A No.

Q Did Musicor ever advise you or the Harry Fox Agency there whereas a license issued to them provided that cross collateralization would not be permitted that they would nevertheless cross collateralize?

A No.

Q Is there a practice in the record or publishing industries that if a license provides for the payment of a royalty on the basis of records manufactured that the record company is nevertheless entitled to pay royalties on the basis of records manufactured and sold?

(Read.)

A No.

Q Do you know, Mr. Berman, whether or not the accounting firm of Prager & Fenton examined the licenses that are the subject of this action, the ones marked as 1-A through F and in folders 2, 3 and 4? Do you know whether

pgbr

Berman-redirect

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or not they examined the licenses that were issued in this particular case, the ones that I just referred to before they went in to conduct their audit?

A No.

THE COURT: You don't know whether they did or not?

THE WITNESS: No.

[Q If these licenses were not examined by Prager & Fenton would it be normal for them to issue in their report something having to do with reserves and the maintenance of reserves by Musicor. This is if they had not seen the licenses and didn't know if the licenses provided for records manufactured or records manufactured and sold, would it have been normal for them to provide for reserves in their audit report?

A No.]

Q Do you understand that question?

THE COURT: I don't think the question is intelligible.

We are worried about this: I would gather from the first audit report, and I have not looked at the other two in the last few minutes, but Prager & Fenton in that first audit report dated May 13, 1968, seems to assume that Music is entitled to take some valid reserves with respect to its accounts with Arch, January, and Sealark, isn't that



1 pgbr

Berman-redirect

2 right?

3 THE WITNESS: Yes.

4 THE COURT: It is a question of the amount of  
5 reserves, right?

6 THE WITNESS: Yes.

7 THE COURT: And they question the amount?

8 THE WITNESS: Yes.

9 THE COURT: Would it not follow that Prager &  
10 Fenton were thinking that royalties were due only on records  
11 manufactured and sold?

12 THE WITNESS: Yes.

13 THE COURT: Otherwise they would not even be talking  
14 about reference at all.

15 THE WITNESS: Yes.

16 THE COURT: They would disallow the whole  
17 reserve?

18 THE WITNESS: Yes.

19 THE COURT: The question for me -- and I don't  
20 mean to get you involved in my business but I have to  
21 worry about what inference I draw from this report: Did  
22 Fox instruct Prager and Fenton that Prager & Fenton was to assume  
23 or consider that royalties were due from these three  
24 companies only on records manufactured and sold?

25 A No.

pgbr

Berman-redirect

THE COURT: One slow step at a time. You will help me more that way.

You didn't give any such instructions to them?

THE WITNESS: No.

THE COURT: To your knowledge?

THE WITNESS: No.

THE COURT: Would it be your assumption that Prager & Fenton made these audits without any specific instructions from Fox?

THE WITNESS: Except for the fact that we asked them to isolate the claim.

THE COURT: With that exception.

We will get back to that, I assume, later.

[ I take it you don't really know the basis on which Prager & Fenton assumed what it did in making this audit do you?

THE WITNESS: No. Without examining each license they would normally go in and audit in their usual way and that is frankly on the basis of manufactured and sold.

THE COURT: Because that is the normal way?

THE WITNESS: Yes.]

THE COURT: Mr. Berman, unfortunately we are sort of fragmenting this case. We will have to come back to you on the question of whether these audits were settled.



pgbr

Berman-redirect-recross

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But we are trying to take one step at a time. That may not be good or bad but that is the way we are doing it.

## RECROSS EXAMINATION

BY MR. COHN:

Q With reference to Mr. Rich's question to you, if Musicor was audited on the basis of manufactured and sold, not manufactured, and if Musicor believed it was operating under United Artists licenses which did provide manufactured and sold rather than manufactured, they would have had no reason to complain to you about anything, would they?

MR. RICH: I object.

THE COURT: Let's have the question read.

(Question read.)

MR. RICH: Objection. I don't think that witness can answer that. That is speculation.

MR. COHN: I am trying to get at --

THE COURT: That is a matter for argument.

Q Mr. Rich asked you, did you hear about any complaint about licenses saying manufactured? You recall that?

A Yes.

Q My question to you is: Prager & Fenton treated these records on a manufactured and sold basis and not on a manufactured basis?

pgbr

Berman-recross

A Yes.

[ Q You said the norm in the industry is manufactured and sold?

A Yes.

Q The United Artists licenses are manufactured and sold?

A Yes. I assume so.]

Q In the license you issued did you have a standard provision that even though you issue a new license in behalf of a publisher that that new license you issue does not supersede or in any way affect a prior license in effect respecting the same records? Isn't that standard? May I hear that question?

(Read.)

MR. RICH: The question is effected to who? If a license is issued to another company is it effected with respect to the other company or is it effected with regard to the new company? I am not sure I understand the question.

THE COURT: Do you understand it?

THE WITNES: Not really.

Q Maybe I could rephrase it.

Isn't it a fact, Mr. Berman, that in the standard Harry Fox license it is made clear that even though



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Berman-recross

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1 a new license is being issued in behalf of your client that  
2 that new license is not meant to supersede nor in any way  
3 effect any prior licenses in effect respecting the particular  
4 musical composition being recorded?  
5

6 MR. RICH: I will object unless the question refers  
7 issued to who?

8 MR. COHN: I assume that when they issued a license  
9 to a company they are not attempting to establish contractual  
10 rights with 50,000 other people who are not --

11 MR. RICH: My objection goes to this basis --

12 THE COURT: Cut this out.

13 MR. RICH: The licenses Mr. Cohen had been referring  
14 to before were licenses issued to United Artists. Now, there  
15 is a license issued to a company called Musicor. I ask  
16 whether or not Mr. Cohn's question refers to the licenses --

17 THE COURT: Mr. Berman, you are aware, I take it,  
18 from what you said before, that at a certain point the licenses  
19 of January, Arch and Sealark were issued to United Artists?

20 THE WITNESS: Yes.

21 THE COURT: Were they issued to United Artists  
22 alone or were they issued to United Artists and Musicor?

23 A We did not issue those licenses so I really  
24 don't know how they were issued to United Artists. We  
25 issued licenses to Musicor and they were to the best of my

1 pgr

Berman-recross

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2 knowledge executed and returned. I have no knowledge --

3 THE COURT: I thought you said there were some  
4 prior licenses issued through your offices that involved  
5 United Artists. Maybe I am mistaken. Not insofar as these  
6 publishers are concerned.

7 THE COURT: You have situations come up where  
8 you have the same musical composition and you have issued  
9 one license to a record company and then you are going to  
10 issue another license to the same record company for the same  
11 composition.

12 THE WITNESS: The new license would supersede the  
13 old license.

14 THE COURT: I want to get the picture.  
15 Do you have to have a license for each record?

16 THE WITNESS: Yes. Each record on each record  
17 number.

18 THE COURT: Even if it is the same performer  
19 and the same group?

20 THE WITNESS: Yes.

21 THE COURT: If you have a license on a composition  
22 issued to a company for a particular record and record number  
23 then a year later you have another license issued to the  
24 same comp for a different record and record number,  
25 Mr. Cohn's question is, I think, is it an industry practice



1 that that second license does or does not supersede or change  
2 the terms vis-a-vis the first license.  
3

4 THE WITNESS: Unless the second license specifically  
5 refers to the same record number and the same artist  
6 as the first license, both licenses would remain in effect.  
7 In other words, there is no -- we have no reason to have  
8 two existing licenses to one company for the same  
9 recording by the same artist.

10 If some some reason we were asked to supersede a  
11 license because a publisher requires a different provision  
12 in the license we would supersede it. But we issue licenses  
13 to each record company and we issued a license to Musicor  
14 based on their request or the request of the publisher.  
15 These are the licensees --

16 THE COURT: I am mixed up.

17 I don't want to get into a big colloquy.  
18 Is our problem that we have got a license issued to United  
19 Artists for the same composition on a particular record  
20 and then at a later date we have a license issued to Musicor  
21 on a particular composition for the same record?

22 I address this to Mr. Rich? Is it for the same  
23 record or for a different record?

24 MR. RICH: I believe it pertains possibly in some  
25 case to the same recording not -- there is a different label.

pgbr

Berman-recross

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1 In other words, with regard to the UA recordings, there  
2 was a different label and I think that Mr. Berman has just  
3 referred to the fact that you need a new license if you  
4 have a different label, even though the recording itself  
5 may be the same.  
6

7 THE COURT: But you didn't have United Artists  
8 involved any more but just Musicor?

9 MR. RICH: Yes.

10 THE COURT: I want to know: Is our problem re-  
11 lated to this, same license or same composition, same record  
12 or is it a different record?

13 MR. RICH: If it is the same in addition to what you  
14 are saying, if it is also the same licensee then it would  
15 be the same license.

16 In this particular case United Artists' licenses  
17 were not issued to Musicor. They were issued by the  
18 plaintiffs to a company called United Artists. The label  
19 under which those records were released were different --

20 THE COURT: It is a different licensee.

21 MR. RICH: A different license company. It is the  
22 same, your Honor --

23 THE COURT: That is the only change.

24 MR. RICH: Not in all cases.

25 THE COURT: Let's take those cases.



pgbr

Berman-recross

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1  
2 There were some cases where the only change was you had  
3 a new licensee.

4 MR. RICH: And a new label and therefore a new  
5 license, correct.

6 THE COURT: You are saying in some cases there  
7 were other changes?

8 MR. RICH: There were other recordings that did not  
9 revert back to the United Artists recordings.

10 THE COURT: Let us suppose --

11 MR. RICH: If I may perhaps clarify this a little  
12 bit. For example, you have a recording -- let us say RCA  
13 comes out with the -- and the song was licensed to RCA by  
14 the XYZ Publishing Company. A tape company, a company that  
15 comes out and manufactured pre-recorded tape wants to use  
16 that same recording but it wants to distribute that recording  
17 for itself, for its tape manufacturer, a new license would  
18 have to be issued to the tape company even though it is  
19 the identical recording because it is a different licensing.

20 THE COURT: Mr. Berman, let us suppose the situation  
21 we were just talking about: You have the same composition,  
22 the same license or, you have got the same record, only there  
23 comes a time when it is going to be issued under the label of  
24 X instead of Y because of a change in ownership or  
25 something like that; is there any industry practice about

1 pgbr

Berman-recross

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2 whether the second license to the second licensee will  
3 or will not be the same, carry over the same terms as the  
4 first licensee?

5 THE WITNESS: No.

6 BY MR. COHN:

7 Q Mr. Berman, if the fact is not as suggested by  
8 Mr. Rich that the record was originally put out under United  
9 Artists' label but the fact should turn out the record was  
10 also put out under exactly the same label, Musicor, including  
11 the period of time when the license was issued to United  
12 Artists-Musicor -- you follow me?

13 A Yes.

14 Q Take that situation. Same license, same label, same  
15 record number. Follow me on all of those. Not a difference  
16 in the world.

17 THE COURT: Just a difference in licensee.

18 MR. COHN: Possibly not a difference there.

19 The original one was --

20 THE COURT: You are assuming now the same licensee?

21 MR. COHN: Yes and although the license was  
22 issued to United Artists Records I think the testimony  
23 will show in effect United Artists Records was a  
24 distributor, Musicor was the manufacturer at all times, and  
25 the license was availed of by Musicor as the manufacturer,



1 ngbr

Berman-recross

2 mpt Imoted Artists which purely performed a distribution  
3 function.

4 THE COURT: What assumption do you want the  
5 witness to consider?

6 MR. COHN: I want him to consider the licenses  
7 issued to Musicor, issued to United Artists as a distributor but  
8 United Artists is in business with Musicor. Musicor does  
9 the manufacturing, United Artist does the distributing.

10 I want you to assume that exactly the same record,  
11 same number, same Musicor label, which was a Musicor label in  
12 United Artists, same everything.

13 Now, when a second license is issued, is it fair  
14 to say that your office provides in that second license that  
15 nothing in the second license should supersede the contents  
16 of the first license if in effect?

17 MR. RICH: I object to the question on the  
18 ground --

19 THE COURT: Overruled.

20 MR. RICH: May I give my grounds?

21 THE COURT: No.

22 THE WITNESS: It is a difficult question to  
23 answer. There would be -- repeat that question.

24 THE COURT: Assume for the purpose of argument you  
25 have the same licensor, the same composition, the same record,

1 pghr

Berman-recross

2 the same label, and you have got this really basically  
3 the same licensor but instead of having United Artists being  
4 the distributor you have just Musicor. Instead of the  
5 Musicor-United Artists combination you have the same label.  
6 Is there any practice about your office if they do issue a  
7 new license, is there any practice about whether the new  
8 license will or will not have new terms?

9 MR. RICH: There are other facts that ought  
10 to be put into that question.

11 THE COURT: You can do that later.

12 THE WITNESS: There would be no reason for us to  
13 issue a new license unless there were new terms. We would  
14 not issue a duplicate license for the sake of issuing  
15 licenses.

16 THE COURT: Anything else, Mr. Cohn?

17 BY MR. COHN:

18 Q My original question to you was this: Whether  
19 you speculate as to whether there would have been a reason  
20 or would not have been a reason, isn't it a fact that in  
21 issuing new licenses in this very case you inserted a pro-  
22 vision that the new licenses were not to supersede the terms  
23 of the old licenses?

24 A Let me see the license.

25 Q Which one, the old or new?



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pgbr

Berman-recross

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1           A    Both of them.    I only issued one.

2           Q    Here is one purportedly issued by you.

3           THE COURT:   What exhibit number?

4           MR. COHN:    It is for identification HH.

5           I will ask you whether or not examining that it refreshes your  
6           recollection as to whether or not there appears in there a  
7           statement "This license does not supersede nor in any way  
8           effect any prior licenses now in effect respecting record-  
9           ings of said musical composition," and I call your at-  
10          tention to the record No. MM203MS3008, and then I will show  
11          you HH-1, and HH-2 for identification and ask you what we  
12          can call the United Artists license and ask you whether or  
13          not they don't refer to the same number.

14          MR. RICH: Objection.    I say that the question  
15          is improper.    The witness should be asked as to whether  
16          or not it supersedes a license issued to the same licensee,  
17          not a --

18          THE COURT:   You objection is overruled.

19          THE WITNESS:   Well, the purpose of the clause, the  
20          clause says --

21          Q    First of all, is there such a clause there?

22          A    Yes.    It says this license covers and is limited to  
23          one particular recording, the music composition as performed  
24          by the artist on the record number set forth, and this  
25

322a

1 pgbr Berman-recross 261

2 license doesnot supersede nor in any way effect any  
3 prior licenses now in effect respecting recordings of  
4 said musical composition.

5 This, of course, only refers to any --

6 THE COURT: You are not reading any more?

7 THE WITNESS: No. This of course only refers  
8 to licenses issued to Musicor and -- we did not, as far as  
9 the Harry Fox Agency is concerned, we did not issue any  
10 licenses to United Artists for these particular compositions  
11 on this particular record number. We did issue licenses  
12 only to Musicor.

13 Q Are you saying that you were probably unaware  
14 of the existence of the United Artists licenses at a time  
15 this provision about this Harry Fox license not superseding  
16 any prior license, could that have been the situation?

17 A I know of no United Artists license.

18 Q Andnot having known of that with different terms you  
19 issued this license with the provision you read to his  
20 Honor, the not superseding provision?

21 A To a new company, yes.

22 Q You said thatsomebody had told you that youwere  
23 to attempt to get a license which provided from Musicor  
24 at some point, which provided manufactured rather than  
25 manufactured and sold, do you recall that?



1

pgbr

Berman-recross

323a

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A Yes.

3

Q Could you fix a time for us and tell us who told you to attempt to issue and obtain the execution of such a license or such licenses?

5

6

A It is difficult for me to fix a time except in a general basis. It may have been late in 1965. I think that was the time. I was instructed by --

7

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9

MR. RICH: He said '65.

10

MR. COHN: Mr. Rich shouldn't testify in the middle of an answer. He has been doing this all through the witness' testimony.

11

12

13

THE COURT: Go ahead with your answer.

14

A The time is vague. I was told by Aaron Schroeder and Abbie Schroeder --

15

16

Q Is this a telephone conversation?

17

A Yes.

18

Q Can you give us the substance of what you recall being said?

19

20

A The substance was any licenses issued to Musicor, any of their copyrights could be issued on a record manufactured basis.

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Q I think what Mr. Rich was trying to suggest to you was might this have been late in 1964 at a time when this flood of licenses were sent out by you?

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Berman-recross

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A I don't remember.

Q Was it Mr. Schroeder or Mrs.?

A They both acted at the same time.

Q Was it a telephone conversation?

A Yes.

Q They were sort of joining in on the other end. That is right.

Q You don't recall which?

A No.

Q It was sort of a composite of what they were both saying to you?

A They work together.

Q Were those instructions every changed?

A Not to my knowledge.

Q But the fact is that you saw after you received those instructions you did issue new licenses on a manufactured and sold basis rather than a manufactured basis, did you not?

A Apparently we did.

Q When Prager & Fenton made the first audit, the audit for the period 1964 to 1967 -- withdrawn.

Prager & Fenton were required to give special attention to the January, Sealark, Arch and Pitfield recordings, were they not?



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A Yes.

Q In fact the special attention was such that they had to do a separate computation for everything and put it in a separate column with reference to those companies, is that not so?

A Not for everything. As I recall, it only covered no charge records. They did not accept in the text of the audit to segregate the reserve.

Q Isn't it a fact that with reference to every bit of computation done in the 1964 through 1967 audit there is a separate finding including that of reserves referring you again to that textual paragraph with reference to the Schroeders?

A Yes.

Q Wouldn't that lead you to conclude that in giving the special attention to the Schroeder group that Prager & Fenton were familiar and had to be familiar with the appropriate licensing provisions governing the rights of their clients?

A No.

Q But you certainly were, weren't you?

A Yes.

Q After the Prager & Fenton report was sent to Musicor was it sent under a letter from you asking that that claim

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Berman-recross

265

1 be given attention?

2 A Yes.

3 Q And after that did conversations ensue between repre-  
4 sentatives of Musicor and representaives of Harry Fox?  
5

6 A Yes.

7 Q At the time those conversations took place -- we  
8 are now in the year 1968 -- if it were not known for some  
9 reason to Prager & Fenton it was certainly known to the  
10 Harry Fox office that Mr. Schroeder wanted his licenses to  
11 cover manufacturer only, wasn't it?

12 A Yes.

13 Q But that contention was never urged once in the  
14 discussions which your office had with Mr. Talmadge or any  
15 of his representatives, was it?

16 A Mr. Fox, when he had conversations with Mr. Tal-  
17 madge, knew that the January interests were not to be included  
18 in any discussions.

19 Q Wait a minute. This whole audit report was dis-  
20 cussed. You have testified in your deposition, haven't you,  
21 that there was a segregation as to items but that there  
22 was not a segregation as to financial or as to the audit and  
23 that the whole thing was a subject of discussion; isn't that  
24 so?

25 MR. RICH: I don't understand the question.



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Berman-recross

265a

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2 THE COURT: I don't either.

3 Why can't we get from him what the discussions  
4 were.

5 We will take a short recess.

6 (Recess.)  
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THE COURT: It seems to me that we are keeping this witness on the stand a little long at this point. Maybe we can somehow summarize it this way.

Is it correct that although you don't recall when this occurred, your testimony is that you sent out the licenses on behalf of plaintiffs saying that royalties were due upon records manufactured?

THE WITNESS: Yes.

THE COURT: That you did that pursuant to the instructions of Mr. and Mrs. Schroeder?

THE WITNESS: Yes.

THE COURT: To some extent, and in a few cases you sent out, or your company sent out, licenses providing for royalties on records manufactured and sold. Do you know why you did that?

THE WITNESS: It must have been a clerical error.

THE COURT: Now we have covered the fact that at least on this first audit, the one that was issued some time in 1968, your auditor must have assumed that royalties were due to the plaintiffs on records manufactured and sold, right, right?

THE WITNESS:

THE COURT: You don't know the basis for



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Berman-

that assumption except that it was the normal practice, right?

THE WITNESS: Yes.

THE COURT: But you don't know why he did or did not do that?

THE WITNESS: Right.

THE COURT: You gave no specific instruction?

THE WITNESS: No.

THE COURT: When you got that report back you personally forwarded that to Musicor?

THE WITNESS: Yes.

THE COURT: When you saw the audit report did you make any objections to the auditor and say, "Oh, you are wrong in assuming that the royalties were due on records manufactured and sold."

THE WITNESS: No.

THE COURT: Was this a mistake or conscious decision or do you have a memory of that?

THE WITNESS: I didn't know the basis of their thinking in working up the report. It was just -- when we received the report we gave it a cursory look and then sent it on.

THE COURT: Did you thereafter have any conversations with anybody representing Musicor?



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Berman

THE WITNESS: I personally did not.

Harry Fox did.

THE COURT: Mr. Fox did?

THE WITNESS: Yes.

MR. RICH: Are we talking about that first audit?

THE COURT: Yes.

That's the only one he has been questioned about so far.

I frankly think that's all we can get out of this witness on this point and it seems to me that, Mr. Cohn and Mr. Rich, the way this issue stands, I think there is enough in the evidence to permit the introduction of the documents into evidence. But that by no means solves our problem, and, really, I think we have to have testimony from the principals and we could let this witness go temporarily and get to that. I will receive into evidence your exhibits 1A through 1F and 2, 3 and 4, but obviously, the weight to be accorded those depends on the whole testimony and the question of whether they need to be reformed in accordance with some other understanding of the parties. That still has to be resolved.

MR. COHN: I will ask no further questions.

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Berman-redirect

MR. RICH: I have a couple of questions to ask the witness right on the point that were discussed.

REDIRECT EXAMINATION

BY MR. RICH:

Q You said you did not recall the time of your conversations with Mr. and Mrs. Schroeder about the issuance of licenses on the basis of records manufactured rather than manufactured and sold. Do you recall that testimony?

A Yes, I did not recall the specific time.

Q The conversation that you had with them would have been obviously prior to the time the licenses were issued, is that correct?

A Yes.

Q A little while ago you were questioned by the judge with regard to certain similarities and also by Mr. Cohn with regard to the same recording the same artist. Do you recall that?

A Yes.

(Plaintiffs' Exhibits 1A through F2, F3 and F4 were received in evidence.)

THE COURT: That means that 2A is is received.



pga5

Berman-redirect

(Plaintiffs' Exhibit 2A was received in evidence.)

Q I show you Exhibit HH1 and HH2 for identification, which were the UA licenses in connection with the songs that are mentioned there. According to those licenses, Mr. Berman, which is the party that was required to pay the license fee to the plaintiffs?

A United Artists Records.

Q Andnot Music, am I correct?

A No.

THE COURT: Does anybody want to offer these?

MR. COHN: I would be delighted to.

MR. RICH: Your Honor, I object to these licenses being offered. I know --

THE COURT: You are asking questions about them.

MR. RICH: Your Honor permitted Mr. Cohn to ask questions about them.

THE COURT: I'll receive them.

MR. RICH: Our point is that these documents have nothing to do with this particular lawsuit. They were issued to another company, another company had to remit royalties.

THE COURT: Your objection is overruled.

(Defendants' Exhibits HH1 and HH2 were received in evidence.)

Q We were discussing previously, and questions were asked of you, Mr. Berman, about the audit reports as to whether or not Prager & Fenton were aware of the fact that reserves should not be maintained because licenses were issued on the basis of records manufactured. I call your attention to Exhibit 10, which is the same as Exhibit CC.

THE COURT: There is no such exhibit.

MR. RICH: Exhibit 10, your Honor.

THE COURT: That's in evidence.

(Pause.)

Q The question was as to whether or not the licenses authorized reserves, do you recall that?

A Yes.

Q I show you this audit report, Exhibit 10, to see whether or not this enables you to answer the question any differently. It is the last page of the written portion of the report of Prager & Fenton that says, "We were advised that reserves are determined on a completely subjective basis by both David Gotterer, the company's accountant, and Arthur Talmadge. The mechani-



1 pga7

Berman-redirect

2 cal licenses issued do not authorize reserves.

3 THE COURT: Is there an objection.

4 MR. COHN: Yes, that's objected to.

5 THE COURT: Sustained.

6 MR. RICH: I should have directed this  
7 to the court's attention.

8 THE COURT: I saw that language. I'll  
9 give the proper weight to it.

10 MR. RICH: That was also in Exhibit 11.

11 THE COURT: All right.

12 MR. RICH: I'm through with the witness.

13 THE COURT: If there is any argument we  
14 can save it.

15 MR. RICH: The UA licenses had referred  
16 to Musicor. My examination does not reveal --

17 MR. COHN: Do you want me to supply --

18 THE COURT: Let's have the next witness.  
19 You may step down.

20 (Witness excused.)

21 MR. COHN: With reference to Mr. Rich's  
22 last statement --

23 THE COURT: I don't need anything further.  
24 Let's have another witness.

25 Do you have any other witnesses on this

1 pga8  
2 point, Mr. Rich?

3 MR. RICH: When you say "this point" --

4 THE COURT: Meaning the authenticity of  
5 the license agreements or the meaning of the license  
6 agreements.

7 MR. RICH: On the authenticity, yes, your  
8 Honor.

9 Your Honor, before Mrs. Schroeder is called --  
10 I started to call her -- your Honor has ruled that  
11 these licenses are to be marked in evidence. I was  
12 going to call Mrs. Schroeder on this but I'll call  
13 her in connection with other things. Perhaps I need  
14 not call her now. I'll call her later on. I think  
15 we can resume with Mr. Straus.

16 THE COURT: Gentlemen, the way it seems  
17 to me the thing is shaping up is this: We have a basic  
18 issue as to whether the license arrangement was for  
19 manufactured on the one hand or manufactured and sold.  
20 If I resolve that issue I think we can then easily  
21 determine the exact makeup of the claims and so forth,  
22 and I think my premonitions this morning were probably  
23 unfounded. In other words, I don't think we have  
24 to sit here and go through this routine license by  
25 license.



pga9

I think, although it may be a little bizarre, what we really ought to do is to try to resolve here and get all the evidence in that anybody wants to put in on this basic, underlying issue, and then I am sure that Mr. Steinberg and Mr. Straus can verify that if one side wins, so-and-so gets so much money, or that kind of thing. If we could do this: would it be acceptable to the parties to just pursue what we call this basic issue? This may mean going right to Mr. Talmadge.

MR. RICH: If I may respond to that, I think the suggestion is a good one, but I have a very severe problem with regard to it.

Mr. Talmadge will take the stand and testify, as Mr. Cohn testified, to a conversation that he had with Mr. Schroeder and/or Mrs. Schroeder. Mrs. Schroeder is in court.

I think I advised you, your Honor, last week through Mrs. March, that Mr. Schroeder's father at that time -- this is last Thursday -- was deathly ill. He did pass away. Mr. Schroeder is in a period of mourning right now. As a matter of fact, Mrs. Schroeder was and is, but because this case was going on and because I explained to her the fact that I needed

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her with me because she may have knowledge of various things that I don't have knowledge of, depending on testimony given in this case, to try to see if she could come to court this morning, which she has done. It would be improper for me to ask Mr. Schroeder to do so. I cannot. There is a specific mourning period in the Jewish religion and Mr. Schroeder is observing that. As a matter of fact, people --

THE COURT: Why does that prevent Mr. Talmadge from starting to testify?

MR. RICH: That's fine. The issue itself can't be resolved because I'll be unable to call Mr. Schroeder as a rebuttal witness until some future time.

THE COURT: Let's take it one step at a time.

MR. COHN: As to that, we are sorry Mr. Schroeder had a death in his family, but Mr. Schroeder and not Mrs. Schroeder is the one with whom the conversations took place. I have documents relating on the question of authenticity which relate to Mr. Schroeder. I realize he has not been here once in the course of this whole thing. Is he going to be here and when?

THE COURT: I think if you would lead



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off with Mr. Talmadge -- I regard this as your burden and I think we could just use every moment. Lead off with Mr. Talmadge and hear his side, and then we will see what has to be done after that.

MR. COHN: Can I do that after lunch? What time do you usually like to start?

THE COURT: Maybe we can go to one. Can you start with Mr. Talmadge now?

MR. BELDOCK: I represent in this case the three distributors who were named. I have, I think, waited patiently while there was an explanation of the facts as to what was involved in this case. I have heard no reference whatsoever to the distributors. Apparently that is no issue in this case, the distributors' liability.

We had earlier back in 1974 set forth a statement of facts with regard to Mr. Rich's claims and at that time, at a meeting with your Honor, I mentioned, although we got off that subject, that there did not appear to be any issue about liability on the part of the distributors, and as you etched the issues out in the case it is quite clear they are not involved.

Albeit I would like to attend because I find the case very interesting, as long as my clients

pgal2

are not under any liability factually, I would like to be excused.

THE COURT: Whom do you represent?

MR. BELDOCK: Malverne, Main Line and Mutual Distributors.

THE COURT: What's your position?

MR. RICH: The law is very clear. If there was an infringement, anyone who had anything to do with the sale of records --

THE COURT: You are not willing to consent to dismiss all of those parties?

MR. RICH: That's right.

THE COURT: They are in.

MR. BELDOCK: Apparently the issues framed do not relate to the participation and sale.

THE COURT: You are wasting my time. This is a waste of time. Let's go ahead with the testimony.

(Pause.)



pgal3

ARTHUR TALMADGE, called as  
a witness by defendants, being first duly sworn,  
testified as follows:

DIRECT EXAMINATION

BY MR. MR. COHN:

Q Mr. Talmadge, are you the president of  
Musicor?

A At the present time, no.

Q At the time involved with the events in this  
case, say from 1964 through 1971, were you the presi-  
dent of Musicor?

A Yes.

Q Prior to becoming president of Musicor did  
you occupy a position with United Artists Records?

A Yes.

Q What was your position?

A Vice president and general manager and  
then president of the Record Division of the motion pic-  
ture company.

Q Of United Artists?

A Yes.

THE COURT: Prior to --

THE WITNESS: 1946. 1964

THE COURT: You were vice president and

pgal4

Talmadge-direct

1  
2 president of what?

3 THE WITNESS: United Artists Record Division,  
4 or United Artists Records, as it was known.

5 THE COURT: That was a division of what?

6 THE WITNESS: United Artists Motion  
7 Picture Company.

8 Q How long have you been in the music business?

9 A Since 1946.

10 Q How long were you with United Artists?

11 A Approximately about three years.

12 Q When did a company called Musicor first come  
13 to your attention?

14 A Before joining United Artists I was vice  
15 president with Mercury Records in Chicago for 15 years.

16 MR. RICH: Could the witness just answer  
17 the question.

18 MR. COHEN: I think this is leading into  
19 it.

20 THE COURT: Please.

21 A And then prior to joining United Artists  
22 I created a label called Musicor Records.

23 Q That was your originally created label?

24 A Yes.

25 Q When did Aaron Schroeder first have anything



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pgal5

Talmadge-direct

to do with Musicor?

A When I joined United Artists in 1960 I met Aaron Schroeder and there was a singer named Gene Pitney. I asked Mr. Schroeder to put Mr. Pitney on the United Artists label. Mr. Schroeder said no, he wanted a label of his own. I advised Mr. Schroeder that I owned a label called Musicor and if United Artists would permit it we would put Gene Pitney on the Musicor label. He would own 50 per cent --

THE COURT: Who is "he"?

THE WITNESS: Aaron Schroeder.

A -- and I, Arthur Talmadge, would own 50 per cent.

Q Approximately when was this?

A This was approximately in 1960.

Q Did you obtain the permission of United Artists and did such arrangement whereby you and Schroeder became 50-50 in Musicor eventuate?

A Yes.

Q Did Musicor, as owned by you and Schroeder, put out recordings by a recording star named Gene Pitney?

A Yes.

Q Did Schroeder hold licenses for Gene Pitney

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Talmadge-direct

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recordings?

A Yes.

Q Did he do anything with respect to those licenses?

MR. RICH: Your Honor, I want to clarify. When you said --

MR. COHN: Through various corporate entities. I assume by this time you knew that.

MR. RICH: You are referring to Aaron Schroeder individually and that's what I'm trying to find out.

THE COURT: You can cross examine. The witness has said this.

Q Mr. Schroeder operated through various corporate entities such as Sealark, January and Arch?

A Yes.

Q Did these entities owned by Mr. Schroeder do anything with respect to the licenses they held on Pitney recordings? Did they make any assignment?

A The assignment was made to Musicor.

Q About when was that?

A The first license issued 1960 and thereafter.

Q The actual license agreements read to United



1 pgal7

Talmadge-direct

2 Artists Records and on the license agreement there is  
3 contained a reference by initials to Musicor labels,  
4 is that right?

5 A Yes.

6 Q Is that the case in each and every one of  
7 the licenses?

8 A Yes.

9 THE COURT: I'm not clear.

10 This was a record operation at this time,  
11 right? You are talking about a record operation you  
12 and Schroeder were involved in?

13 THE WITNESS: Mr. Schroeder was the presi-  
14 dent of Musicor when we created this company. I was  
15 the vice president and subsequently the president of  
16 United Artists, which distributed Musicor. Mr.  
17 Schroeder's regular business was a publisher of these  
18 companies, January, Arch, Sealark and Pitfield.

19 THE COURT: He was president of those com-  
20 panies?

21 THE WITNESS: I assume he was the head  
22 of it.

23 THE COURT: He was head of the publishing  
24 companies.

25 THE WITNESS: He owned the publishing com-

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Talmadge-direct

panies and I assumed he was the president.

THE COURT: When Mr. Cohn asked you about Schroeder holding the licenses --

THE WITNESS: In essence he issued it to himself.

THE COURT: So far in this case I have not been involved with any licenses held by January or Arch or Sealark but with their licenses held for publishing held by those entities.

THE WITNESS: Yes. May I explain?

THE COURT: Yes.

THE WITNESS: When Mr. Schroeder was the president of Musicor he was also the owner and the head of January, Arch, Sealark and Pitfield Publishing Companies in a separate location. He issued these licenses for the Gene Pitney recordings and other recordings under the Musicor label to United Artists from his publishing companies, January, Arch, Sealark, and Pitfield. When these licenses issued they were issued to Musicor with United Artists as the distributor of our label.

Q Does each one of these licenses to United Artists Records, Inc. bear a specific reference to the Musicor label?



pgal9

Talmadge-direct

1  
2 A Yes.

3 Q Musicor was owned by you and Schroeder?

4 A That is true.

5 THE COURT: Let's adjourn.

6 2:15.

7 MR. COHN: I have a sentence before  
8 Judge Knapp at 2 o'clock but I shall be back in  
9 time.

10 (Recess.)

AFTERNOON SESSION

(2:20 p.m.)

A R T H U R      T A L M A D G E      resumed.

THE COURT:      Can I see Exhibits HH1 and HH2, those United Artists licenses that are in evidence.

MR. COHN:      Yes, your Honor.      I think the other side had them last.

(Pause.)

THE COURT:      I have them, gentlemen.

DIRECT EXAMINATION CONTINUED

BY MR. COHN:

Q      Mr. Talmadge, before the lunch recess I believe we were at a point where you testified that Schroeder, through his entities, issued these licenses to United Artists, Inc. on a basis whereby the records were to be manufactured under the Musicor label.

A      Yes.

Q      Your testimony is that on each and every one of the licenses, the United Artists licenses, the United Artists-Musicor licenses governing the records at issue in this case, there is a specific reference to the Musicor label?

A      Yes.

Q      That's why I asked for HH1.      HH1 is a



pg21

license dated January 28, 1964. I just was looking to see if there was a reference.

Q Could you explain thst to the judge?

A It's right here (indicating).

MR. RICH: May I see that, your Honor? I missed it myself.

Q Mr. Talmadge, have you reviewed Exhibit HH,  
which was premarked by the defense? Exhibit HH  
contains the licenses issued by the Schroeder entities  
to United Artists Records for the recording of records  
involved in this case under the Musicor label.

A Yes, sir. These are the licenses issued  
to Musicor and United Artists.

Q Are these the licenses which Musicor has  
operated under at all times involved in the litigation  
in this suit?

A Yes.

MR. COHN: I offer these in evidence, your Honor.

I'll offer HH. There are already in evidence HH1 and 2. I now offer the balance of the licenses which tie in with the records in this case and have been premarked Defendant's Exhibits HH.

MR. RICH: I object to the introduction

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Talmadge-direct

of these licenses. I repeat what I said before.  
These are licenses with United Artists Records which  
refer specifically to those recordings that were distributed  
by United Artists and under which they were required  
to pay royalties to the plaintiffs in this action.

THE COURT: That objection is overruled.  
Proceed.

(Defendants' Exhibit III was received in  
evidence.)

Q Is it a fact that each and every one of  
these licenses provides a grant by the Schroeder Corpora-  
tions to United Artists Records, its successors and  
assigns?

A Yes. That's what it states.

Q On each and every license?

A Yes.

Q And each and every license is for manufac-  
tured and sold?

A Yes.

Q Did there come a time when Musicor acquired  
the rights of United Artists to these licenses and to  
the Pitney recordings?

A Yes.

Q When was that?



pga23

Talmadge-direct

1 A That was subsequent to May 8, 1964.

2 Q What happened on or about May 8, 1964?

3 A May 8, 1964, Musicor began to function under  
4 its own operation.

5 Q Did you in effect buy out Schroeder?

6 A Yes, I did.

7 Q How much money did you pay --

8 THE COURT: Is this the May 8, '64 date?

9 THE WITNESS: When the purchase agree-  
10 ment between Schroeder and myself as stockholders was  
11 consummated.

12 THE COURT: Generally speaking, what was  
13 the purchase agreement to do?

14 THE WITNESS: I bought out his interest  
15 in Musicor.

16 Q How much did you pay?

17 A \$110,000 in cash and \$50,000 in payments.

18 Q In addition to the 110?

19 A Yes.

20 Q Total of \$160,000?

21 A Yes.

22 Q After your purchase of Schroeder's interest  
23 in Musicor did you continue to manufacture and sell  
24 the records, the platters, involved in this case  
25

1 pga24

Talmadge-direct

2 under the United Artists licenses?

3 A Yes.

4 Q Did you enter into an agreement with United  
5 Artists? Did Musicor enter into an agreement with  
6 United Artists?

7 A The settlement agreement was entered in with  
8 United Artists.

9 Q You bought out Schroeder's interest and  
10 now you were 100 Musicor?

11 A Yes.

12 Q Did you quit United Artists at that  
13 point?

14 A I quit prior to that.

15 Q You quit just prior to that?

16 A Yes.

17 Q Did you have an agreement with United Artists  
18 selling up with what happened to inventory and who had  
19 liabilities concerning these records issued in this  
20 case?

21 A Yes. It was a written, finalized agree-  
22 ment.

23 Q Referring to the records in this case,  
24 is that correct?

25 A Yes.



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Talmadge-direct

Q That agreement dated October 7, 1964?

A Yes.

Q I show you Defendants' premarked Exhibit Y for identification and ask you whether that is the agreement between Musicor and United Artists?

A Yes.

MR. COHN: I offer this.

THE COURT: Any objection?

(Pause.)

THE COURT: Didn't you see this Friday?  
It's exactly what we want to avoid.

MR. RICH: Your Honor, I don't understand  
what this is being introduced for.

THE COURT: Do you object on the grounds  
of relevancy?

MR. RICH: Yes.

THE COURT: I overrule that objection and  
receive it.

(Defendants' Exhibit Y was received in  
evidence.)

Q Mr. Talmadge, have you examined the licenses,  
the purported licenses, offered by plaintiffs in this  
case dated October 1, 1964, which have been received  
in evidence as Exhibits 1, 2, 3 and 4, I believe?

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Talmadge-direct

2 THE COURT: I don't understand that.

3 A I'll correct you. They are dated  
4 Decemger 21st, retroactive to October.

5 Q 1964?

6 A Yes.

7 Q Do any of them bear your signature?

8 A No.

9 Q Did you authorize anybody else to sign your  
10 name to any of these licenses?

11 A No one was authorized to sign my name at  
12 that time?

13 Q I'll come to it next. The answer to that  
14 is no?

15 A No.

16 Q At any time did you authorize anyone to sign  
17 your name to these licenses?

18 A Yes. That was subsequent to the receipt  
19 of these licenses at a later date.

20 Q At a what?

21 A At a later date we appointed two agents.

22 Q But not to these particular licenses?

23 A No.

24 Q I want to stick to these licenses first.  
25 Do any of these licenses bear your genuine



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2 signature?

3 A No.

4 Q Did you ever authorize anyone else to sign  
5 your name to these licenses?

6 A No one.

7 Q Were there occasions in other dealings when  
8 you did permit Musicor to sign licenses through a  
9 signature other than yours?

10 A Yes.

11 Q What were the signatures other than yours?

12 A Natalie Grob and Barbara Bock.

13 Q Was it your stipulation that each time they  
14 signed a license they were to indicate alongside their  
15 signatures the word "agent"?

16 A Yes.

17 (Defendants' Exhibits II and JJ marked for  
18 identification.)

19 Q I want to show you II and JJ for identifi-  
20 cation and ask you whether those are samples of  
21 licenses signed by Barbara Bock and Natalie Grob, with  
22 the word "agent" written alongside of their names under  
23 the legend Musicor.

24 A Yes, they are.

25 Q Do any of the licenses which the plain-

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tiff offered this morning, Exhibits 1, 2, 3 and 4, contain the signatures of Natalie Grob or Barbara Bock as agent?

A No.

Q Is there any authorized signature on any of the licenses offered by plaintiff this morning?

A None of them.

Q Did you ever see these licenses or something like them before?

A Yes.

Q Could you tell his Honor when and under what circumstances?

A Upon receipt of these licenses --

Q Referring now to Plaintiffs' Exhibits 1, 2, 3 and 4?

A Yes.

Q When was this?

A This was the latter part of December, 1964. The licenses came in in Exhibits 1, 2, 3 and 4 dated December 21st as of October, 1964.

Q How did you receive them?

A They came in the mail.

Q You don't know who mailed them?

A No.



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Q Whether it was Fox or Schroeder?

A No.

Q What did you do after you received them?

A As I recall, it was the end of the month and they were kept on my desk and, of course, at the time of the receipt I was very disturbed on receiving them because --

MR. RICH: Objection as to what his feelings were when he received it.

THE COURT: I'll get the whole context.

A They came by mail. They came to my desk.

Q What did you do?

THE COURT: Did you look at them?

THE WITNESS: I looked at them.

Q Were they signed?

A They were blank. They were stamped with the Harry Fox agent and trustee signature.

Q What did you do with the licenses?

A I then took the licenses and sent them back either to the Fox office or to Aaron Schroeder's office without any signature?

Q Did you see the licenses again at a later time?

A Yes.

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THE COURT: Did you have a covering letter for this occasion when you sent them back?

THE WITNESS: I just packed them up. I sent them right up.

THE COURT: Do you remember whether you sent them to Fox or Schroeder?

THE WITNESS: I don't recall.

Q Did there come a time when these licenses were returned to you again?

A Yes.

Q How long after the first mailing?

A I would say they came back approximately two or three weeks later.

Q When they came to you a second time where there had previously been a blank under the word "Musicor" was anything written?

A My name.

Q Had you signed your name?

A No, that's not my signature.

Q When you received these licenses back two or three weeks later with a signature purporting to be yours, what did you do?

A I called up Mr. Schroeder.

Q Tell us what you said to Mr. Schroeder and



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2 what he said to you, as best as you can recall.

3 A I was very upset about these licenses coming  
4 back to me with the signature which was not mine and  
5 I called up Mr. Schroeder and said, "Look, what the hell  
6 is going on here? I have received these licenses with  
7 a signature that is not mine for licenses that we are  
8 operating and using from the original licenses from  
9 United Artists and I don't see any reason why these  
10 licenses should be sent back to me. Who in the devil  
11 signed them?"

12 Q Did you say anything to him as to why you  
13 specifically had not signed the licenses?

14 A Yes. I said, "There is no reason for me  
15 not to sign these licenses because we have licenses --  
16 there is no reason for sending the licenses I sent, sent  
17 back."

18 MR. RICH: Can the reporter read it?

19 MR. COHN: I think you have a double nega-  
20 tive.

21 A There is no reason for me to sign these li-  
22 censes and that's why I sent them back unsigned.

23 Q Did you tell him why?

24 A I said, "We have licenses that you issued  
25 through your various publishing companies as the head

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of the publishing companies to Musicor when they were  
being distributed, when Musicor was being distributed  
by the United Artists, and these are the licenses  
under which we are paying our royalties and are now in  
effect and will continue to be in effect as long as  
these same recordings are issued under the label  
Musicor."

Q Did you have any discussion with Schroeder?  
Did you say anything to him about the rate of royalty  
provided in these new licenses which had been sent to  
you?

A I then mentioned to Schroeder of a  
discussion that we had prior to the purchase of the  
company, that the purchase price was extremely high  
and that as a concession and the fact that I was enjoying  
the reputation in the industry as one of the top  
merchandisers in the field, that I would have these  
various recordings by Gene Pitney reissued and that we  
had discussed, and he had agreed that all the record-  
ings contained in the albums issued by United Artists  
and distributed by them would then contain a 1-1/2-cent  
rate for those recordings done prior to May 8, 1964 as  
used in albums only.

Q Did these new licenses which had been mailed



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1 to you contain the 1-1/2-cent provision you say Schroeder  
2 had agreed upon?  
3

4 A No.

5 Q You objected to that?

6 A Strenuously.

7 Q What did Schroeder say when you told him  
8 that you would not go by these new licenses?  
9

10 Well, as far as the new licenses were  
11 concerned, he said he knew that his office had issued  
12 these licenses to United Artists, which he was well  
13 aware of. He said as far as the licenses that I had  
14 received the second time, that it was evidently a  
15 clerical error and it was issued to us and had no  
16 bearing on the original license and the original  
17 selections and the original recordings done by the  
18 various artists that Musicor had issued and described  
19 by United Artists and to disregard these licenses inasmuch  
20 as we had been operating under those licenses since the  
21 takeover of the company from May 8th to the time that  
22 he shipped in those licenses on December 21, 1964.

23 Q Did you say anything to him with refer-  
24 ence to the date he wanted you to sign for on the  
25 licenses?

A I said, "As far as the date is concerned,

you have this dated December 21st, retroactive to October," which is highly irregular, because if the license is issued it should have one date.

It so happened that in October we were then permitted by United Artists to distribute those Pitney recordings inasmuch as our agreement stipulated that they would be allowed from October, 1964 on a non-exclusive basis to sell the United Artists-Musicor recordings distributed by United Artists of various albums that they had on hand.

What I'm trying to say is that we were restricted by United Artists --

THE COURT: "We" meaning whom?

THE WITNESS: Musicor.

A We were restricted by United Artists until October of 1964 from selling the Musicor product.

THE COURT: After October, 1964 Musicor could itself distribute?

THE WITNESS: That's right.

THE COURT: You used the word "nonexclusive."

THE WITNESS: And United Artists had the usual industry practice of a six-month "selloff."

Q Does this tie in the question of returns



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and for whose account they would be?

A Yes.

Q Tell the judge about that.

A When United Artists had until October to sell exclusively Musicor recordings these were then shipped out to something like 35 distributors.

Subsequent to the nonexclusive selloff from October, and hence for the six months, they could continue to sell Musicor recordings.

Q Is it fair to say that after October 4, 1964 United Artists would stop sending returns on Musicor records and acceptance of returns --

A Would come back to us.

Q Would be your responsibility?

A Yes.

Q Was that formalized in a notice to distributors sent out by United Artists under date of June 8, 1964?

A Yes. This is a bulletin dated June 8, 1964 from United Artists to all distributors regarding Musicor records.

Q It is in substance that from October 4, 1964 the responsibility for returns would be Musicor's, no longer United Artists?

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1  
2 A That's what it says.

3 Q After that conversation with Schroeder, in  
4 which you pointed out these discrepancies or  
5 these things and said you would not recognize these new  
6 licenses and he told you, as you have just testified --

7 THE COURT: You don't have to sum up.

8 Q After the conversations with Schroeder, I  
9 guess it would be the beginning of 1965, would that be  
10 about right?

11 A Yes.

12 Q Have you at all times operated under the  
13 manufactured-and-sold licenses issued by the Schroeder  
14 companies to United Artists for publication under  
15 Musicor labels?

16 A Yes.

17 Q Those licenses tie in exactly with the  
18 records involved in this case?

19 A Yes.

20 Q They provide in each and every instance that  
21 the licenses are subject to succession and assignment.

22 A It so states.

23 Q And each one is a manufactured-and-sold  
24 license?

25 A Yes.



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30.

Q I now want to bring you up to 1968, the time after the first Harry Fox audit was complete. Do you recall receiving a letter from the Harry Fox office containing a copy of the Prager & Fenton audit report?

A Yes.

Q And did that letter invite your consideration of the Prager & Fenton report?

A Yes.

Q Did the report call your particular attention to the fact that that -- first of all, did you notice from the report that the Schroeder company recordings were in a separate column?

A Yes. It said so.

Q Did you notice under the reserve section that Prager & Fenton challenged the amount of the reserves you had been keeping with reference to the Schroeder records as being too large?

A It said specifically this is excessive for a one-year period.

Q Following the receipt and examination of that report did you have any meetings with the Harry Fox office?

A I did.

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Q How many?

A I would say I had three or four.

Q As a result of those meetings was a settlement arrived at between Musicor and the Harry Fox office?

A Yes.

Q Was there any discussion as to whether or not that settlement included the Schroeder company?

A Yes, it did.

Q Did it include them?

A By all means.

Q Was there ever anything said by the Harry Fox office to you in the course of those discussions about some new license which provides for manufacture only rather than manufacture and sale?

A There was a mention about the machines but I was told to disregard them and they were done on manufactured and sold.

Q Is it a fact that in connection with all three of the Harry Fox audits, that all three were done and reported to you on a basis of manufactured and sold?

A That's true.

Q And that in none of them is there a segrega-



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tion as to any licenses on a basis of manufactured only?

A None whatsoever.

Q By the way, drawing upon this particular situation and your expertise, 30 years in this field, could you tell his Honor what was the financial difference to you as a potential purchaser of the Schroeder interest in Musicor of the difference between manufactured and sold?

A Well, first, value. My purchase of the Schroeder interest in Musicor was based on an operating situation of licenses issued on the basis of manufactured and sold which Aaron Schroeder, as president of the company, issued to his publishing companies.

Now, the difference between records that are manufactured and records that are manufactured and sold are enormous, because in our industry -- and this goes without saying, irrevocably as far as all the companies that I am aware of, everything is sold on 100 per cent consignment or returned. That's the way these records are shipped. That means that if it was reverted back to manufactured, all these records shipped out on a consignment basis would have to be paid for and this would cause enormous losses not only to my company but it would never have been purchased from

1       pga40

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2       Mr. Schroeder, as far as my interest was concerned.

3               THE COURT:       You say Mr. Schroeder issued  
4       some kind of statement to his publishers?

5               THE WITNESS:     When Musicor was distributed  
6       by United Artists the distribution agreements stated  
7       as follows:     That all costs, including pressing,  
8       publishers, artist royalties, manufacturing of albums,  
9       records, jackets, art work, trade paper ads and  
10      everything, would be deducted off the top of the  
11      gross royalties and then the net royalties would then  
12      be paid over to Musicor.

13              Now, the publisher moneys were then sent  
14      directly in trust to the -- according to the agree-  
15      ment and the contract signed between Aaron Schroeder  
16      and Musicor to the Musicor office, of which Aaron Schroeder  
17      was president and was located at different addresses,  
18      and it was his duty to send the publisher's money  
19      to his companies as well as any other publishing  
20      companies that ,ay have been involved in the use of  
21      these recordings done by the various artists that were  
22      on the Musicor label.

23              Q       By the way, was it on Friday that you  
24      were able to get a look at these licenses which were  
25      offered this morning and the signatures on them?



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A We met at the court's request in the jury room opposite this courtroom with Mr. Adam Gilbert and Mr. Arnold Rich and myself and we exhibited to Mr. Rich our exhibit, and subsequently Mr. Rich then showed us the licenses that he had brought to enter into exhibit.

Q Did you tell him they did not bear your signature?

A I looked at them and said, "I didn't sign these" and I said, "I think I can explain that."

And he says, "How is that? Were you present at the time?"

THE COURT: You don't have to get into that.

A He said, "This is a duplicate" --

THE COURT: The 1-1/2-cent agreement that you say was made with Mr. Schroeder, I guess, back in 1964, was that put in writing in any form?

THE WITNESS: Actually it was confirmed to me -- my attorney discussed this with him also.

Q Whom do you mean by "him"?

A My attorneys at the time.

Q "Him"?

A Mr. Schroeder.



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THE COURT: Was it in writing?

THE WITNESS: My attorneys confirmed it to me then in writing on June 8th.

THE COURT: Do you have that?

MR. COHN: I was saving it for cross examination material for Mr. Schroeder but I'll bring it out now.

(Pause.)

MR. COHN: Please mark this.

Q When you spoke to Schroeder early in 1965, as you told his Honor a few minutes ago, you told us one of the points you made is: These new licenses that were sent to me provide two cents, but our deal was 1-1/2 cents, and this goes against the deal we made last June and I will have nothing to do with these licenses, in substance.

A Yes.

Q Now, his Honor has asked you, was there any writing? I want to ask you this: after you and Schroeder agreed on 1-1/2 cents for pre-1964 Pitney albums, did you communicate with your attorney and ask him to confirm that agreement with Schroeder?

A Yes.

Q What was the name of your attorney?



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Q Did Mr. Moelis report to you that he had spoken with Aaron Schroeder and confirmed the 1-1/2-cent --

If there was such a conversation, Mr. Moelis ought to be in court to testify.

I'll offer this subject to Mr. Moelis' testimony.

MR. COHN: Whenever you want him. I  
this was going to come up today.

THE COURT: Everything is going to come up today except Mr. Schroeder's rebuttal testimony.

MR. COHN: He can be here first thing in the morning.

THE COURT: I don't have that time available. I'm starting another case at 10 o'clock.

MR. COHN: I don't see how we will finish this today. I've never heard it said when Mr. Schroeder is going to be here.

THE COURT: I want to use every minute.

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MR. COHN: May I lay a foundation?

MR. RICH: I think I have an objection  
on the record.

THE COURT: I sustain the objection at  
the present time.

Mr. Cohn will try to lay a foundation.  
BY MR. COHN:

Q Exhibit LL for identification, is this the  
letter to which you refer?

A Yes.

(Defendants' Exhibit LL was marked for  
identification.)

MR. RICH: Objection, your Honor. Again  
he is trying to do indirectly that which he cannot do  
directly.

THE COURT: Let me see the exhibit.

(Pause.)

THE COURT: What is Exhibit LL, Mr. Talmadge?

THE WITNESS: This is a confirmation that  
my attorney, Herbert Moelis, had with Mr. Schroeder  
in regard to the 1-1/2-cent rate.

THE COURT: You received that letter at  
or about its date?

THE WITNESS: Yes.



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2 THE COURT: Let me look at this.

3 (Pause.)

4 THE COURT: I'll receive this to show that  
5 this witness received the letter. If we are going  
6 to have evidence about a conversation between Mr.  
7 Moelis and Mr. Schroeder, one or both of those people  
8 will have to testify and I assume they will. I'll  
9 receive the letter for just as much as I have said.

10 MR. RICH: Your Honor is not receiving it  
11 it for the truth of anything contained therein?

12 THE COURT: Not at the moment. I  
13 understand that both witnesses will be here. There  
14 is no problem.

15 Any further questions?

16 MR. COHN: Nothing further.

17 (Defendants' Exhibit LL was received in  
18 evidence.)

19 CROSS EXAMINATION

20 BY MR. RICH:

21 Q Mr. Talmadge, you had mentioned that there  
22 was certain consideration for the sale of Mr. Schroeder's  
23 stock in Musicor to you. You had mentioned specifically  
24 100 --

25 THE COURT: 106.

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Talmadge-cross

Q -- a total of \$160,000, 110,000 in cash and \$50,000 in additional payments, is that correct?

A Yes.

Q Wasn't there additional consideration, Mr. Talmadge, besides that, namely, the production agreement with Mr., Schroeder that was entered into simultaneously with the sale of the stock?

A Yes.

Q Under that other agreement Mr. Schroeder was given the right to produce at least 50 per cent of the recordings of Gene Pitney, is that correct?

A Correct.

Q Isn't it a fact, Mr. Talmadge, that you tried to make changes in that production agreement to reduce the amount that would be payable to Mr. Schroeder and that when Mr. Schroeder disagreed with your suggestion that Mr. Schroeder receive less, you prevented him from producing recordings of Gene Pitney in order to save the money?

MR. COHN: Objection.

A This has nothing to do with this court.

THE COURT: The question was far too involved for me to understand. I will sustain the objection simply on the grounds I can't understand the



1 pga47

Talmadge-cross

2 question.

3 Q Isn't it a fact, Mr. Talmadge, that the  
4 production agreement that was entered into with Mr.  
5 Schroeder between Mr. Schroeder and Musicor was adhered  
6 to by Musicor until about December of 1964 when you  
7 demanded that certain changes be made in that production  
8 agreement?

9 THE COURT: There has been mention of a  
10 production agreement. Could you just tell me basically  
11 what that provided?

12 THE WITNESS: After I bought Mr. Schroeder's  
13 interest in Musicor Records for \$110,000 in cash and  
14 payments of \$50,000, Mr. Schroeder and I entered into  
15 a production agreement whereby he would produce 50  
16 per cent of the recordings by said artist Gene Pitney  
17 as long as the contract with Gene Pitney existed with  
18 Musicor, which from the time of the signing of this  
19 contract, which was, I think, roughly about June, 1964,  
20 would continue until the end of Gene Pitney's contract  
21 which had about 10 years or roughly to 1974, he would  
22 be allowed to produce.

23 THE COURT: I don't understand the sig-  
24 nificance of Schroeder producing 50 per cent of the  
25 recordings.

THE WITNESS: It's a different case entirely.

THE COURT: Just as long as it has come up, was he going to do this for you?

THE WITNESS: He was going to be compensated on a royalty basis.

THE COURT: He was physically going to produce the recordings?

THE WITNESS: This was in addition to to the cash he got. He would have the opportunity to produce and he would pay royalties on records manufactured and sold.

THE COURT: He would?

THE WITNESS: We would. To Mr. Aaron Schroeder. Musicor would pay a royalty to him as a producer for all subsequent recordings after I left United Artists, their being my distributor.

We now have entered into a new phase of making new recordings with said artist Gene Pitney and Mr. Schroeder --

THE COURT: I don't understand this. What does this have to do with our case?

MR. RICH: My question goes to the witness' veracity. He has testified to a number of



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Talmadge-cross

2 conversations. I'm now trying to show that when it  
3 suits Mr. Talmadge, that he will just breach agree-  
4 ments, he will change agreements, and he has done so  
5 in this particular case.

6 THE COURT: Are you telling me this  
7 in and of itself, aside from veracity points, this is  
8 a different agreement than the license agreements we  
9 are dealing with in this case? Is that right?

10 MR. RICH: The agreement I am referring  
11 to, your Honor, refers to testimony that Mr. Talmadge  
12 has given, specific testimony, in a couple of different  
13 areas.

14 THE COURT: Mr. Rich, I can't understand  
15 anything about this.

16 MR. RICH: Your Honor, if you will permit  
17 me to ask the question.

18 THE COURT: This is quite involved.  
19 I don't understand it.

20 MR. RICH: It is not. The witness  
21 before testified --

22 THE COURT: You are due before Judge  
23 Krapp?

24 MR. COHEN: He is going to call me when  
25 he needs me.

1 pga50

Talmadge-cross

2 THE COURT: Let's hear from the wit-  
3 ness.

4 When you made your purchase --

5 THE WITNESS: May 8, 1964, I bought Mr.  
6 Schroeder's interest. About a month later, and  
7 prior to the purchase of his interest, we agreed that  
8 he would produce -- a producer is one that takes an  
9 artist in the studio and makes recordings.

10 THE COURT: What would he do with those  
11 recordings? Was he to market them?

12 THE WITNESS: They were our record-  
13 ings, Musicor's recordings?

14 THE COURT: He will give them back to you  
15 to market?

16 THE WITNESS: Yes.

17 THE COURT: He would perform the service  
18 of producing the records?

19 THE WITNESS: Yes.

20 THE COURT: You were to have licenses and  
21 you were to have the ability to market the --

22 THE WITNESS: There were no licenses.

23 MR. RICH: These are just producer's  
24 services.

25 THE WITNESS: He would go in a studio and



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make the recording and the contract stipulated for  
all of those --

THE COURT: Were you paying for services?

THE WITNESS: All of those recordings  
that were sold, he would be paid on the records that  
were manufactured and sold a royalty, and --

THE COURT: For services?

THE WITNESS: That's right.

THE COURT: I don't have to worry about  
the particular license agreement.

THE WITNESS: Just as an added fact, he  
was also the purchaser and used many of his own songs  
in the recording of Gene Pitney and we had to  
pay him publisher royalties.

THE COURT: You had to get licenses from  
him?

THE WITNESS: Yes.

THE COURT: Proceed.

Q This production agreement I believe you have  
already testified was added consideration for the sale  
of the Schroeder stock to you of Musicor?

A No, it was not.

THE COURT: It is not important.

MR. RICH: I think the witness testified

1           pga52

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2           to the opposite.           He said it was consideration.  
3           Now he has changed his mind.

4                   THE COURT:     Go to the next point.     I  
5           don't care about the characterization.     It means noth-  
6           ing to me, that it added consideration.

7                   Q     Isn't it a fact that there came a time when  
8           you demanded changes in the compensation Mr.  
9           Schroeder was to receive under this production agree-  
10          ment?

11                   MR. COHN:     I object to that.     It has  
12          absolutely no relevancy to the license issued in this  
13          case.

14                   THE COURT:     Overruled.

15                   MR. COHN:     This case has been the  
16          subject of a state court litigation for eight years.  
17          If we are going to come in and try this now and you think  
18          we are going to finish today --

19                   Q     Isn't it a fact, Mr. Talmadge, that when  
20          Mr. Schroeder refused to change his compensation downward,  
21          that you prevented him from participating in further  
22          recordings under that agreement?

23                   MR. COHN:     Your Honor, I don't understand  
24          that.     If the witness does, I don't object to it.  
25          I don't know what "prevented" means.



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Talmadge-cross

2               I'll object to that.

3       THE COURT:     Overruled.

4               If you don't understand the question, say  
5       you don't.     I'll overrule the objection.

6       THE WITNESS:    I don't understand the  
7       question.

8       THE COURT:     Rephrase it.

9               Q       Mr. Talmadge, isn't it a fact that the Appel-  
10       late Division, after a full trial --

11       MR. COHN:       We are not going to the  
12       Appellate Division, your Honor.

13       MR. RICH:       This is relevant.     If I may  
14       ask my question like I permitted --

15       THE COURT:     Take it easy, both of you.

16               I'll hear the question, and there is no  
17       jury here to get prejudiced.     We don't have to have  
18       a side bar.     I can hear the question and then I can  
19       rule on it.

20               Finish your question.

21               Q       Isn't it a fact, Mr. Talmadge, that the  
22       Appellate Division referred to portions of your  
23       testimony earlier today and described the situation this  
24       way:

25               "Plaintiff on May 8, 1964 sold his 50

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Talmadge-cross

per cent interest in defendant corporation, which was Musicor, to Arthur Talmadge, who owned the balance of stock. Musicor was engaged in the business of recording songs and the sole asset was a contract with one Gene Pitney, a singer. On the same date plaintiff entered into a contract with Musicor to act as a producer for" --

THE COURT: I'll interrupt. I am not going to hear this, absolutely not.

MR. RICH: Your Honor, if the Appellate Division found after a full trial that Mr. Talmadge in effect cheated Mr. Schroeder at about the same time of these transactions here, I think that goes to the question of veracity of the witness here.

THE COURT: No, it does not. I won't have it. If there is a relevant citation, an Appellate Division decision, that can come to my attention, you can bring it to my attention. You have not done that. To bring it up and read the decision to Mr. Talmadge is a waste of everybody's time and I'm not going to get -- frankly, nothing that has been said has indicated to me anything but the most possible marginal relevance, if that. You are not making it any clearer to me as you go on.



pga55

Talmadge-cross

320

1        It was never mentioned to me as an issue when we were  
2        discussing the things to be tried, and I am not  
3        going to get into that.

4        So for better or worse, I am sustaining the  
5        objection.     I am not going to permit the witness to  
6        be cross examined about that other litigation.

7        I want to get to the point, which is whether  
8        he made an agreement with Mr. Schroeder for 1-1/2  
9        cents, whether he signed any licenses in December,  
10       whether there were conversations he alleged, or any other  
11       relevant circumstances.     If you have cross examination  
12       on those things, conduct it, or else we will terminate  
13       this witness.

14       MR. RICH:     I wish to say the following  
15       briefly --

16       THE COURT:     Don't say the following.  
17       We have spent a long time today on colloquy.     You  
18       go ahead with your questioning on relevant issues,  
19       please.

20       Do you have anything?

21       MR. RICH:     I have a lot.

22       BY MR. RICH:

23       Q     Mr. Talmadge, you said that you had received  
24       certain licenses from somebody.     These are the licenses  
25

1 pga56

Talmadge-cross

2 that are marked as 1A through F in the packages marked  
3 2, 3 and 4?

4 A As I recall, they are marked 1, 2, 3 and  
5 4.

6 THE COURT: Yes, it is correct.

7 Q Mr. Talmadge --

8 THE COURT: We all know this.

9 MR. RICH: I have to ask things in my  
10 way. It may not be the best way. I can't help  
11 that.

12 Q Whom did you receive those licenses from?

13 A I mentioned that I don't recall.

14 Q You don't recall if it came from Harry Fox  
15 or anybody else, is that correct?

16 A I said they had Harry Fox's stamp on them.

17 Q Do you know what company or individual sent  
18 you those licenses?

19 A No, sir.

20 Q Were those licenses sent with a covering  
21 letter?

22 A No, sir. They were put on my desk.

23 Q When those licenses came in you said that  
24 you initially did not have any conversation with  
25 anybody about those licenses but you just sent them back



1 pga57

Talmadge-cross

2 to a certain party, is that correct?

3 A That's correct.

4 Q What party did you send them to?

5 A I don't recall.

6 Q It might have been Harry Fox?

7 A Either Harry Fox or Mr. Schroeder's office.

8 Q Did you send them back with a covering let-  
9 ter?

10 A No, I didn't. I so stated.

11 Q How did you send them back? Did you  
12 pyysically put them in an envelope?

13 A I have nothing to do with the mailing  
14 desk.

15 Q Did you speak to anybody in your office as  
16 to who to mail them to?

17 A I don't recall.

18 Q Did you instruct somebody in your office  
19 to mail them back?

20 A I don't recall. This is what, ten years  
21 ago?

22 Q Your memory is fresh on certain things and  
23 not on others.

24 MR. COHN: Do we need that, your Honor?

25 Q Is there a secretary or a clerk --

pga58

Talmadge-cross

1                   pga58  
2  
3                   MR. COHN:     I move to strike Mr. Rich's  
4                   comment about the witness' memory being good --

5                   THE COURT:     Mr. Rich, there is  
6                   nothing you have asked him that is not repetitious.

7                   MR. RICH:       This is cross examination.

8                   THE COURT:     But cross examination should  
9                   not be repeating the direct.     I have notes.     I remem-  
10                   ber clearly what he said, which was very recent.     If  
11                   you don't think I can remember, I disabuse you of  
12                   that.     You can assume I know his direct.     You  
13                   can stick in additional questions to supplement or ask  
14                   something different.     I will remember the direct.  
15                   That's what cross examination is.     But you don't have  
16                   to waste time the way you are doing.

17                   MR. RICH:     I submit I am not wasting  
18                   time.     I am trying to get at the facts.

19                   Mr. Talmadge is claiming something --

20                   THE COURT:     Ask questions.     I have  
21                   seen a lot of cross examination in this courtroom, and  
22                   a good cross is not repetitious.     I don't have  
23                   time for it.

24                   MR. RICH:     I am sorry.     I didn't ask  
25                   these questions before and there is a bi dispute as  
                 to what happened and it is going to take time as to what



1 pga59

Talmadge-cross

2 happened. My eliciting this testimony from this  
3 witness with regard to these conversations and things  
4 that took place --

5 THE COURT: Do not repeat.

6 BY MR. RICH:

7 Q Was there anyone in your office at that  
8 time that you would have directed return these licenses  
9 back to a particular party?

10 A I don't recall.

11 Q Is there any document in Musicor's files,  
12 a copy of a letter perhaps, which would indicate that  
13 these licenses were returned back to someone with a  
14 covering letter?

15 MR. COHN: I believe he testified as far  
16 as he recalls there was no covering letter. He  
17 testified to that twice.

18 THE COURT: Overruled.

19 Q Is there a copy of a letter in Musicor's  
20 files which would indicate that these licenses were re-  
21 turned back to a party and you don't recall who it was?

22 A I so stated, there was no covering letter,  
23 to my recollection.

24 Q Are you in the habit of sending packages  
25 or things to various people, like returning licenses

1 pqa60

Talmadge-cross

2 and important matters like that, without covering let-  
3 ters?

4 A In this particular case, emphatically yes.

5 Q Have you ever returned a license back to  
6 anybody, other than the licenses you claim were re-  
7 turned back --

8 A Mr. Rich, I don't recall.

9 Q Did you speak to anybody on the telephone  
10 concerning these licenses that you received?

11 A Not at the time of return.

12 Q You thereafter testified that these licenses  
13 were returned back to Musicor with a signature, isn't  
14 that correct?

15 A Yes.

16 Q You didn't sign or have anybody in Musicor  
17 sign on behalf of Musicor?

18 A They went out blank and came back signed.

19 Q By the way, did you think that was improper  
20 on the part of anybody to sign the name of Musicor?

21 A I didn't think anything.

22 Q I'm talking about when you got them back,  
23 did you think it was improper?

24 A I had no reflections.

25 Q Do you know of any other instances where some-



1 pga61

Talmadge-cross

2 body signed Musicor's name to a contract or license  
3 that was not signed by Musicor itself without authority?

4 A Without authority?

5 Q Yes. Do you know of any other instance?

6 A Where maybe without authority but not with  
7 my authority?

8 Q So what you are claiming here is that these  
9 licenses were signed by an unauthorized party, isn't  
10 that correct?

11 A Yes.

12 Q Were you angry about this?

13 A Was I what?

14 Q Angry about the fact that somebody signed  
15 Musicor's name without authority, they forged Musicor's  
16 name.

17 A They didn't forge Musicor's name. I  
18 stated that the signature was not mine. I didn't sy  
19 say anything about Musicor.

20 Q Was your name on the license?

21 A The license --

22 Q Did the license appear with your name on  
23 it?

24 A Which license are you speaking of.

25 Q The ones you said were thereafter returned

back to Musicor.

A There was a written name supposedly saying Arthur Talmadge, which was not my signature.

Q It would stand to reason that the name was inserted by someone other than Musicor itself or a Musicor party, is that correct?

A I would assume so.

Q So in effect what somebody was doing was forging your signature, isn't that correct?

A No, I didn't say that. I said they came back to me with a signature which was not mine. When I say someone, I cannot be specific.

Q Mr. Talmadge --

THE COURT: Mr. Talmadge, I think the point Mr. Rich is trying to get at, let's take a little time, I think you said these things came back for the first time and you saw signatures.

THE WITNESS: Yes.

THE COURT: Did you make any inquiry as to whether those signatures had been put on in your company in the course of the handling?

THE WITNESS: When I sent these licenses back they were blank. I gave it to whoever the secretary was at that time, which was a number of



1      pga63

Talmadge-cross

2      years ago, and I said, "Return these." I don't recall  
3      at the time who I asked to return them to.

4                      THE COURT:      Listen to my question:  
5      When you got them back, there were two basic possibilities,  
6      I suppose, as to who put those signatures. One would  
7      be somebody in your shop or one would be somebody outside  
8      your shop. One could think of those possibilities,  
9      could not one?

10                   THE WITNESS:      Yes.

11                   THE COURT:      If it was done by somebody  
12      outside, for instance, somebody at Schroeder's place  
13      or somebody at Fox, if it was not forgery it would be  
14      something close to it?

15                   THE WITNESS:      Yes.

16                   THE COURT:      If it was done in your shop  
17      I guess your version would be that that was a mistake,  
18      that's something you never instructed, right?

19                   THE WITNESS:      Yes, sir.

20                   THE COURT:      But at least it might not be  
21      forgery or anything close to it?

22                   THE WITNESS:      Yes.

23                   THE COURT:      That's different?

24                   THE WITNESS:      Yes.

25                   THE COURT:      When you got these back, did

that kind of thinking go through your mind at all or not?

THE WITNESS: No. Frankly, sir, to the best of my recollection, I was very upset about it because the last time I had handled them they were supposed to go back unsigned. When I got them back signed I immediately called Mr. Schroeder. I was a little emotional about it.

THE COURT: You are saying the first thing you did when you got these back was you called Schroeder?

THE WITNESS: Yes.

THE COURT: It goes without saying that you didn't check?

THE WITNESS: That's right.

THE COURT: Did you ever check within your own shop to see if somebody had signed these without your --

THE WITNESS: I possibly did with whatever clerk was available. We are a very small organization. We had three people at the time. There was not much room for a who would have done it.

THE COURT: Did you find anything out?

THE WITNESS: No one seemed to be aware that these were signed. As a matter of fact, no one



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Talmadge-cross

knew anything about these licenses because we had a sales manager, we had a secretary, myself, and maybe one other person.

THE COURT: Did you ever find out who had put your signature on the documents?

THE WITNESS: No, sir, I did not.

THE COURT: I think that's all we can do with that subject.

Q Did you ever ask Mr. Schroeder or Mrs. Schroeder or anybody from the Fox agency why they signed these licenses without authorization?

A Mr. Rich, may I give you --

Q Answer my question.

A No.

THE COURT: If there was an objection, I would sustain it.

MR. COHN: There is an objection.

THE COURT: Sustained.

Q Did you ever ask anybody as to whether or not they signed your name on these licenses?

A I think I went over that with your Honor.

Q What's your answer.

THE COURT: I don't know why there are not

pga66

Talmadge-cross

1 objections.

2  
3 MR. COHN: Because your Honor is ap-  
4 parently permitting --

5 THE COURT: Objection sustained.

6 MR. RICH: I don't think we ever got an  
7 answer to that.

8 THE COURT: I sustained an objection to  
9 that. It is repetitious.

10 Q You were referring previously, Mr. Talmadge,  
11 to the United Artists licenses; do you recall that?

12 A In what respect.

13 THE COURT: Yes, he did.

14 Q Do you recall you talked of a provision in  
15 some agreement that Musicor had with United Artists  
16 permitting United Artists, providing United Artists with  
17 assigning the United Artists licenses to Musicor;  
18 do you recall that?

19 A I don't understand your question.

20 Q Isn't it a fact that United Artists never  
21 assigned the United Artists licenses which were  
22 marked in evidence here today to Musicor?

23 A I still don't understand your question.

24 THE COURT: Read that.

25 (Question read.)



pga67

Talmadge-cross

(Question read.)

A The answer is no.

THE COURT: They didn't or --

A They did assign.

Q Was that done by a document, by an instrument of some kind?

A It so states on the license.

Q Could you show me where it states it?

THE COURT: I show you HHL.

THE WITNESS: Line 4 from the top.

Q This says that January Music Corporation grants to United Artists Records, its successors and assigns the nonexclusive license to use the words or music or both of the compositions mentioned on this exhibit.

My question to you is this: Is there an instrument or document that you ever received from United Artists assigning this particular license or any license to Musicor?

A Yes.

Q Where is that, please? Identify it.

A The document on the completion of the agreement between United Artists and Musicor, on all product papers, etc., etc., etc.

pga68

Talmadge-cross

Q I show that to you which was previously marked as Defendants' Exhibit Y and I ask you to show that to me specifically -- this is the letter agreement of October 7, 1964 -- where it states in that document that United Artists assigns the licenses which are the subject of our discussion now to Musicor.

(Pause.)

A Paragraph 1. Taking the last part:  
Thereupon the undersigned shall turn over to you at your expense inventory of Musicor Records in the USA and shall turn over or arrange for the turnover at your expense all master recordings, tapes, stampers, plates, separation slicks, hardware and other such items used by the undersigned in the manufacture of Musicor records.

There is another one.

Q Those were physical things that --

A May I finish? You asked me something.

Q Go ahead.

A On or before March 15th, paragraph 6, 1965,  
the undersigned shall account to you for all mechanical license copyright royalty reserves held by the undersigned in respect to Musicor Records which shall pay to you the balance of such reserves. You agree to be solely responsible for any and all mechanical copyright



pga69

Talmadge-cross

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royalties then or thereafter claimed in respect to any  
USA sales and so forth and so on.

Q Will you agree with me that there is no reference in this agreement to the fact that United Artists assigned the licenses which are the subject of our discussion here today, the UA licenses, to Musicor?

MR. COHN: That's objected to. It is becoming argumentative.

THE COURT: Sustained. It's all in the document. You don't have to have an argument.

Q This is the document you are relying on, Defendant's Exhibit Y, as stating that the licenses, the UA licenses, were applied to Musicor, is that correct?

The document will speak for itself but I want to know if there is any other document besides Defendants' Exhibit Y that you claim where there was an assignment of UA licenses.

MR. COHN: Limiting this to documents --

THE COURT: That's a proper question.

A This document --

THE COURT: That's the license itself.  
Proceed.

Q United Artists, Mr. Talmadge, was a manufacturer,

1 pga70 Talmadge-cross

2 isn't that correct?

3 A No.

4 Q Isn't it a fact that United Artists manufac-  
5 tured and sold these Pitney recordings and musical  
6 recordings that we have been referring to?

7 A No.

8 Q Who was the manufacturer?

9 A The manufacturer -- we were the manufac-  
10 turer.

11 Q Musicor manufactured its own --

12 A Musicor Record Corporation.

13 Q And it paid for the manufacture?

14 A No. United Artists did not manufacture  
15 either. It was done on an outside pressing plant.

16 Q Who requested the pressing plant to manufacture  
17 these recordings that are the subject of this lawsuit?

18 A In their capacity as the distributor I  
19 believe United Artists did.

20 Q United Artists ordered the manufacturing  
21 of these records, is that correct?

22 A At our request, yes.

23 Q Did they always have to clear it with you  
24 before they would go ahead and have certain --

25 A They cleared it with Mr. Schroeder.



pga71

Talmadge-cross

Q Mr. Schroeder advised --

A He was the president of the corporation.

Q He, according to you, instructed United Artists as to how many records to press?

A He instructed United Artists to press the records.

Q And they pressed it in the quantity they deemed best?

A They didn't physically press them --

Q They caused them to be pressed?

A Yes.

Q What company paid the royalty, the mechanical royalty, to January, Arch and Sealark?

A United Artists.

Q And they were paid by United Artists pursuant to the express terms of the license?

A In trust for the publishers.

Q It paid the mechanical royalty to the publishers?

A In connection with the contract signed by Mr. Schroeder.

THE COURT: The contract is something different than what we are talking about. We are talking about a mechanical royalty.

1 pga72

Talmadge-cross

2 MR. RICH: Royalties on the sale of phono-  
3 graph records are called mechanical royalties.

4 A The contract I speak about is the contract  
5 signed by Mr. Schroeder offered in evidence between  
6 United Artists and Musicor Record Corporation.

7 Q What you are referring to are the license  
8 agreements, Exhibit III?

9 A No, I'm not. I'm referring to the con-  
10 tract which was offered as an exhibit.

11 Q Could you tell me which exhibit that was?

12 A I don't know. I would have to see the  
13 exhibits. It's the United Artist contract with Musicor  
14 Records, the original one.

15 MR. RICH: Has that been marked in evi-  
16 dence?

17 MR. COHN: It has not been received.

18 Q The fact is --

19 THE COURT: We are going ahead without  
20 it.

21 MR. RICH: I would like to see that.

22 THE COURT: You go ahead with something  
23 else.

24 Q Under these various UA license agreements, III  
25 in evidence, under the specific terms of those licenses



1 pa73

Talmadge-cross

2 United Artists was to pay the publishers, January, Arch  
3 and Sealark?

4 A In trust.

5 Q I show you the license. Show me where it  
6 says about paying in trust.

7 A I refer to the master agreement which so  
8 states.

9 MR. RICH: I would like to see the master  
10 agreement.

11 MR. COHN: You asked for it five minutes  
12 ago. When we get it, we will give it to you.  
13 The court indicated to go on to something else.

14 Q You mentioned two employees, Grob and Bock.

15 A Correct.

16 Q During what period of time were they employed by  
17 Musicor?

18 A I believe Barbara Bock was employed from '65  
19 to about '66 and then Miss Grob started -- Mrs. Grob  
20 started about '66 also until '71, I think, or '72.

21 Q Before Miss Grob and Miss Bock were employed  
22 by Musicor who signed the licenses on behalf of Musicor?

23 A I did.

24 Q Just you?

25 A Yes, sir.

pa74

Talmadge-cross

Q Do you remember a discussion that we had last Friday in connection with the production of documents, and do you recall your calling attention to the fact that the signatures on some of licenses that you showed to me were not your signature? Do you recall that?

A I'm the only one authorized to sign at that time.

Q Do you recall telling me, Mr. Talmadge, that other people signed the Musicor licenses at that time, signed your name?

A No, I do not.

MR. RICH: Your Honor, I want to ask at this point if it would be necessary -- I could either affirm it now or take the stand and swear to it --

THE COURT: We will handle that by way of rebuttal. Finish your cross examination with this witness and see what you need to do.

Q Have you reviewed all of the licenses --

MR. COHN: We have that agreement which confirms what Mr. Talmadge told you.

Q Here is the agreement.

(Defendant's Exhibit 2 was marked for identification.)



pga75

Talmadge-cross

MR. COHN: I think it's page 6.

THE COURT: Off the record.

(Discussion off the record.)

Q You referred back to a discussion concerning a 1-1/2-cent royalty rate; do you recall that?

A Yes.

Q When for the first time did you have a discussion with anybody representing the plaintiffs in this action concerning a 1-1/2-cent royalty rate?

A Some time in late '63, early '64.

Q Would you be more specific as to that time?

A I didn't hear you.

Q Would you be more specific as to the date?

A I could not.

Q In any event, it would be before the stock purchase or stock sale agreement where Mr. Schroeder sold his stock to you? It would have been some time before.

A It may have been. I can't be specific. It's too far back.

Q Is there anything you have that could refresh your recollection?

A No.

Q I could refer you to that stock sale agreement and ask you if that would refresh your recollection.

1 pga76

Talmadge-cross

2 A I recall one very vividly.

3 Q That doesn't refresh your recollection as  
4 to point of time?

5 MR. COHN: He said that.

6 THE COURT: It's unbelievable.

7 Q Could you tell me who you spoke to about  
8 that 1-1/2-cent rate?

9 A Aaron Schroeder.

10 Q Where did this conversation take place?

11 A On the telephone.

12 Q Do you recall where you were and Mr. Schroeder  
13 was? Who put in the call?

14 A I think I was at my home.

15 Q Did you call him or did he call you?

16 A I don't recall.

17 Q Do you recall if Mr. Schroeder was at home  
18 or in his office?

19 A I have no idea.

20 Q Can you tell me what it is that you requested  
21 and said and what Mr. Schroeder said concerning  
22 this 1-1/2-cent rate

23 A This was part of a discussion. This was the  
24 subject matter which was part of the discussion in regard to  
25 Gene Pitney.



pga77

Talmadge-cross

Q What was said by the both of you?

A That -- this was said before.

THE COURT: Are you now going to repeat what is in the record?

MR. COHN: I object.

MR. RICH: I would like to hear it.

THE COURT: I will lend you my notes. If you want to take a question that is based upon something he said -- simply to ask what is a repetition, I will not permit that and I will not have any argument about it.

MR. RICH: I feel as though I am being restricted on cross examination. I have a right to review his testimony and go over his testimony as to what he said before and question him about it.

There is a sharp disagreement as to the facts between what Mr. Talmadge says --

THE COURT: I am certain there is.

MR. RICH: I have a right to go into this.

THE COURT: Take this up with the Court of Appeals. Don't argue with me. I will not permit naked repetition, and that's what is going on here. I will lend you my notes. I will have the court reporter read the testimony and you can ask questions built upon

1 pga78

Talmadge-cross

2 the direct and that's all you can do. I assume you  
3 know how to do that.

4 MR. RICH: I am sorry. I thought I was  
5 doing it or trying to do it.

6 Q Mr. Talmadge, this 1-1/2-cent rate that you  
7 refer to, did that pertain to the Pitney recordings,  
8 for example, that January, Arch and Sealark had purchased  
9 or the songs of those three?

10 A I stated in my testimony previously that  
11 it referred to all recordings prior to May 8, 1964, if  
12 they were used in album form.

13 Q Isn't it a fact that you had an understand-  
14 ing or an agreement with Mr. Schroeder that all mechanical  
15 royalties which became due from Musicor to Mr. Schroeder's  
16 publishing companies, January, Arch and Sealark, in  
17 respect of any master recording produced by Mr. Schroeder,  
18 produced under his production agreement, was to be at  
19 the full statutory rate of 2 cents, not a penny and a  
20 half?

21 A You are jumping from one thing to another  
22 and I don't understand you. I don't understand you.  
23 You are in another field now.

24 Q Isn't it a fact that with regard --

25 A Which contract are you speaking about.



1 pga 79

Talmadge-cross

2 Q I'm asking you a question regardless of a  
3 contract. Isn't it a fact that you had an understand-  
4 ing with Mr. Schroeder that with regard to recordings  
5 that Mr. Schroeder produced or was to produce under  
6 the production agreement, that the agreement was that  
7 Musicor would pay no less than two cents per recording  
8 as a mechanical --

9 A I stated specifically for the third or  
10 fourth time that my discussion with Mr. Schroeder on  
11 the 1-1/2-cent rate applied only to those recordings  
12 recorded prior to May 8, 1964. In reply to your second  
13 question, in regard to the producer's contract signed  
14 for all subsequent recording to May 8, 1964, as a  
15 producer the statutory rate will apply, period.

16 THE COURT: Judge Knapp is just about ready.  
17 I think we have to let Mr. Cohn go as long as it is  
18 necessary.

19 What other witnesses do we have?

20 MR. COHN: Mr. Straus, Mr. Steinberg, Mr.  
21 Moelis.

22 THE COURT: Straus and Steinberg --

23 MR. COHN: You are going to have Mr.  
24 Berman back?

25 I don't know if they are going to have Mr.

1 pga 80

Talmadge-cross

2 Berman back.

3 THE COURT: Mr. Berman would testify,  
4 apparently, about those free goods. Can Mr. Berman  
5 testify about the audits?

6 MR. RICH: He will testify as to the issue  
7 of the settlement to the audit.

8 MR. COHN: I guess we have --

9 THE COURT: We have Berman back, Moelis --

10 MR. COHN: Staus.

11 THE COURT: I don't know about him.

12 MR. RICH: Mrs. Schroeder.

13 MR. COHN: Steinberg.

14 THE COURT: I would like to go to 5:30.

15 MR. COHN: Off the record.

16 THE COURT: We will recess now until Mr.  
17 Cohn gets through with Judge Knapp.

18 (Recess.)  
19  
20  
21  
22  
23  
24  
25



1 1 pgbr

2 4:55 p.m.

3 THE COURT: What I think the remaining business  
4 is, we have to have testimony of Mr. Berman on the issues.  
5 I assume he is going to be asked about this free goods  
6 problem?

7 MR. RICH: Right.

8 THE COURT: And he will be asked to testify  
9 to the extent that he knows about audit settlements?

10 MR. RICH: He will not be asked about the free  
11 goods.

12 THE COURT: Who is going to testify with respect  
13 to that?

14 MR. RICH: Mr. Straus.

15 THE COURT: What does he know?

16 MR. RICH: There was a stipulation in court with  
17 regard to singles at least.

18 THE COURT: How about the LP's?

19 MR. RICH: I will question somebody else.

20 THE COURT: Who?

21 MR. RICH: There is another witness. I will  
22 probably get to that on cross examination.

23 THE COURT: Who?

24 MR. RICH: Mr. Steinberg.

25 THE COURT: That ought to be interesting.

1 2 pgr

2 But you are going to ask Mr. Berman solely as to  
3 what he knows about settlement or non-settlement of audits?

MR. RICH: Yes.

5 Your Honor, if I may, we were surprised, greatly  
6 surprised, by this defense that Mr. Talmadge came up with,  
7 that he and nobody from Musicor had signed the licenses that are  
8 involved in this suit. I think that this is the first time  
9 that they ever asserted this defense. Obviously they would  
10 know if they ever signed or authorized the signing of these  
11 particular licenses.

12 In other words, Mr. Talmadge said this is the first  
13 time he has inspected these particular licenses but he would  
14 know if these licenses were in existence before. What  
15 I would like since it's obvious that this trial will be  
16 put off, it is five to five and your Honor says we are  
17 going to be terminating at 5:30 today, I would like to  
18 request that Musicor produce for the next session all  
19 licenses issued to it through the Harry Fox Agency for the  
20 period commencing May --

21 THE COURT: Did you ever take Mr. Talmadge's  
22 deposition?

23 MR. RICH: No, your Honor. This is the first  
24 time that this defense ever came up. As a matter of fact,  
25 I might say, your Honor, that prior to today Musicor has



1 3 pgr

2 always claimed and asserted before this Court that the  
3 licenses that we are claiming are the ones in existence  
4 between the parties in fact with the licenses. And for  
5 that reason and because of Mr. Talmadge's defense raised  
6 now for the first time after this case was instituted in 1968,  
7 never asserted in pleadings or anything else, I ask that  
8 we have a right at this point to ask Mr. Talmadge to  
9 bring into this court on the adjourned date copies of all  
10 licenses issued from the Harry Fox office or anybody else,  
11 any other publisher, to Musicor in the period 1964 through  
12 1965. I would like to compare the signatures on those  
13 various licenses to see whether or not there are signatures  
14 similar to those that Mr. Talmadge says was never signed.

15 THE COURT: I would like you to take the stand  
16 again, Mr. Talmadge.

17 MR. COHN: I would like to answer that for  
18 a minute. He is right that due to -- there has been  
19 a lot of confusion attendant upon almost every issue in this  
20 case. It is only during the last two months that Mr. Rich  
21 has found out what his case might be about.

22 THE COURT: No, no. That doesn't help us.

23 MR. COHN: I don't have to sit here and hear  
24 Mr. Rich say this is the first time he ever hears about  
25 United Artists licenses or anything like that. We sent your

1 4 pghr

2 Honor about two months ago copies of the typical United Ar-  
3 tists license with a covering letter pointing out that  
4 as far as we are concerned those are the valid subsisting  
5 licenses not these unsigned licenses that we saw for the  
6 first time on Friday which Mr. Rich is claiming under.  
7 There has never been a clear definition as to what licenses  
8 they are claiming under. We never saw actual copies of them  
9 until Friday when seen only for a few minutes. We asserted  
10 the United Artist thing a matter of months ago when we sent  
11 your Honor a sample copy of the United Artists license in  
12 here.

13  
14 It is true that over and above and beyond the  
15 licenses we rely on the course of dealings between the  
16 parties over a ten-year period, which has always been on a  
17 manufactured and sold basis, Harry Fox audits and everything  
18 else. That is true. And we also rely on the custom and  
19 usage and prior practices of the party.

20 THE COURT: This is not helpful. The point is,  
21 and I regret spending five minutes on describing the history  
22 of this litigation, but the fact is that in a document  
23 which is not dated but it is a document that we used, con-  
24 tinually called defendants' response to plaintiffs'  
25 proposed statement of agreed facts, and we have been  
using it since last fall, in that document there is



1 5 pqr

2 the statement at the bottom of page 2, Musicor states it  
3 has issued 45 licenses on the basis of records manufactured,  
4 not 174 as plaintiff claims.

5 That is a very important and has been an extremely  
6 important statement on which I have certainly based a good  
7 deal of work in the case and it is contrary, flatly contrary,  
8 to the position taken today by Mr. Talmadge on the stand.

9 The 45 licenses which were said in that indictment  
10 to be filed by the defendants, the 45 licenses which were  
11 said to have been issued to Musicor, are detailed in a  
12 schedule at the end of that document and we have used this  
13 continually in these lengthy pretrial conferences that we  
14 have had. That schedule, which you are familiar with in  
15 almost sickening detail has a list of titles, license  
16 dates, publishers, record numbers and it has two columns, one  
17 column is headed Manufactured and the other is Manufactured  
18 and Sold, and there is an indication which keys in precisely  
19 with the statement I have read and there is a list and a  
20 table in this schedule which says exactly what the 45 licenses  
21 are which you told me, your counsel told me, were issued on  
22 the basis of records manufactured. That column adds up to  
23 45.

24 I understand that the claim which Mr. Cohn just  
25 described, I have understood all along and I think I more or

6 pgr

less grasp it, and that was that despite the expressed language in the license you had various reasons, as we will say, extrinsic to those licenses for varying from the license: industry practices, oral agreements, or something, but as far as the execution of the license, I must say that this is the first moment -- I won't say it is the first moment -- Mr. Cohn indicated to me when he called Saturday that they were digging into documents and this argument might be made but I didn't discuss the merits of the case with Mr. Cohn nor did he offer to. He was simply describing to me the need for getting together at 9 o'clock in the morning.

This is a very serious issue whether those licenses were in fact executed, but this is a brand new position to me. I will tell you right now I treat with some scepticism the claim that 45 or more licenses were shipped out of your offices without being executed in that office. The other possibility is that somebody outside forged the signatures. That is a crime. That is always possible and as we know from criminal cases can only be proved but that is something, you have a heavy burden. I am not saying this is a criminal case but you do have a burden on that.

I don't want to prolong the discussion but I think that I will unquestionably permit Mr. Rich to have further discovery as to documents. I will not have them produced



1 7 pgbr

2 for the first time at 9:30 next Wednesday. That will take  
3 up everybody's time in court, but I am going to require  
4 that those additional licenses which he has requested  
5 were -- I think his request is this: Any additional  
6 licenses executed on behalf of Musicor having been granted  
7 by other companies during this time, he asks production  
8 of it and I will grant that request.

9 Let us be more specific.

10 MR. COHN: I understand. That is fine. That  
11 is no problem at all.

12 THE COURT: Let us have it more specific.

13 MR. RICH: I would like the licenses issued to  
14 Musicor by all publishers during the period starting with  
15 May of 1964 through and including 1965 that were not signed  
16 by Musicor.

17 MR. COHN: While you are on documents--

18 MR. RICH: May I just finish with something.

19 THE COURT: When can that be produced?

20 MR. COHN: Friday, your Honor.

21 MR. RICH: I am not going to be here Friday.

22 The trial was put off until next Wednesday.

23 MR. COHN: At your request.

24 MR. RICH: I would like to be the one to inspect  
25 these documents. Could we inspect it the Tuesday, a day

1 8 pgr

2 before Friday?

3 THE COURT: It is up to you.

4 MR. COHN: Any time after Friday that Mr. Rich  
5 wants them.

6 THE COURT: Where will they be able to be picked  
7 up, delivered, or what?

8 MR. COHN: Down here? I don't care. Or at the  
9 Musicor --

10 THE COURT: Could Mr. Straus get busy on those If  
11 it is a question of signature I would like to inspect it.

12 MR. RICH: This is not an accounting situation.

13 THE COURT: I will expect you, Mr. Rich, and even  
14 if you have to take an earlier plane, you have got your  
15 responsibility in this trial. You are going to have to have  
16 done whatever analysis on those before you arrive in this  
17 court 9:30 Wednesday. We will not pause while you have  
18 a handwriting expert start in or whatever you are going to  
19 do. These documents will be available, and so we don't have  
20 any mix-up on the phone there to be available upon  
21 request -- where can he get them? I hate to bother with  
22 this.

23 MR. TALMADGE: Who wants to look at them?

24 THE COURT: Mr. Rich wants to pick them up.

25 MR. RICH: We are all in the same neighborhood.



1 9 pghr

2 If they can be brought to Mrs. Straus' office 2 o'clock in  
3 the afternoon on Wednesday --

4 MR. TALMADGE: Why doesn't he come to our offices?

5 MR. RICH: Tuesday, I mean.

6 MR. COHN: 2 o'clock Tuesday.

7 One other thing, we have repeatedly asked for  
8 a copy of the Schroeder Company agreements with the  
9 Harry Fox office and we keep getting promises and have never  
10 seen them.

11 MR. RICH: I was requested about that on Friday and  
12 when I also spoke to Mr. Gilbert on Saturday Mr. Gilbert  
13 asked me for the same thing. I told him since I would  
14 be on trial here that all we would do, we would request the  
15 plaintiff companies to have it available. They were to  
16 send somebody up to the plaintiff companies. We put in a  
17 call this morning. They have the documents or a copy of the  
18 documents available, the original for them to inspect.  
19 They have been waiting all day for someone- from Musicor to  
20 bring it down just as Mr. Gilbert said they were going to.  
21 As a matter of fact, I have understood they have probably  
22 received it. I didn't check it.

23 MR. COHN: Do I interpret this to mean that any  
24 time from hereon in we can send over?

25 MR. RICH: Yes.

1  
2  
3 Your Honor, I would like to introduce two things  
4 in evidence at this point. I don't know if the other document  
5 has to be. It goes to the same point we have been dis-  
6 cussing as to what licenses Musicor has always understood to  
7 be the licenses involved in this particular claim.

8 THE COURT: Make your offer.

9 MR. RICH: The first thing is a document served  
10 upon me --

11 THE COURT: Mr. Rich, we can cover that. Can't we  
12 take a witness now? We have a half an hour?

13 MR. RICH: Right on this point, that is all.

14 I would like to introduce as a plaintiffs' exhibit  
15 a document served upon me, defendants' pretrial memorandum,  
16 undated, but it must be part of the record of this court.  
17 This is when Beldock and Cushnick were defendants attorneys.  
18 On page 2 it states "This action concerns 120 musical compo-  
19 sitions in which plaintiffs allege ownership of all right,  
20 title and interest including copyrights. A full list of  
21 such --

22 MR. COHN: Could we finish with Mr. Talmadge's  
23 testimony?

24 MR. RICH: I would like to intrdouce this and mark  
25 it in evidence.

THE COURT: Why have a witness sitting here?



1 11 pgr

Berman-direct

2 That is a document. We can cover that easily at another  
3 time.

4 Is Mr. Berman the next witness?

5 A L B E R T B E R M A N, resumed.

6 THE COURT: Who will examine him? If he is  
7 testifying solely on the settlements, do you want to examine  
8 him?

9 MR. COHN: All right.

10 DIRECT EXAMINATION

11 BY MR. COHN:

12 Q Mr. Berman, the questions I am going to put  
13 to you now are with reference to the three settlements.

14 First of all, we can call them settlements 1,  
15 2 and 3.

16 You are clear what we are talking about?

17 A Yes.

18 MR. RICH: Objection. He is referring to  
19 settlements. That may be Mr. Cohn's terminology. Call them  
20 audits.

21 Q Audits.

22 A Audits.

23 Q 1 is '64 through '67; 2 is '67 through '69 and 3  
24 is '69 through '71.

25 A Yes.

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Berman-direct

Q No. 1 is the one in which you told us that there was a segregation of the Schroeder companies into a separate column.

A Yes.

Q And the fact is that your audit report as we had your testimony this morning covered those in a separate column.

THE COURT: I know that.

Q At the time of all three of these audits is it a fact the Harry Fox Agency was the agent for the Schroeder companies?

A Yes.

Q Was your agency ever revoked?

A No.

Q Do you have with you a copy of the agency agreement between you and the Schroeder companies?

A No.

Q Would I be safe in assuming it followed the usual standard in which you are given very broad powers insofar as both examination and settlement are concerned?

A Yes.

Q With reference to audit No. 1, is it a fact that following audit No. 1 there was a settlement in the sum of \$11,000?



Berman-direct

1 13 Doby  
2 A Yes.

3 Q That was paid to you by Musicor in the form of  
4 two approximately equal checks?

5 A Yes.

6 THE COURT: About 11,000?

7 THE WITNESS: Total.

8 THE COURT: Paid in two checks?

9 THE WITNESS: Yes.

10 Q Did you ever at any time write to Musicor  
11 to the effect that you were excluding the Schroeder companies  
12 from that settlement?

13 A That was not conveyed to them in writing.

14 Q At any time?

15 A No.

16 Q Prior to audit No. 1, did you receive any writing  
17 from the Schroeder companies in any way revoking your  
18 authority to settle in their behalf?

19 A Not to my knowledge.

20 Q Is the only thing you received from the Schroeder  
21 enterprises what you had referred to this morning, a tele-  
22 phone call from Mr. and Mrs. Schroeder?

23 A Yes.

24 Q When did you place that?

25 A It is very difficult. Some time prior to 1966 or

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Berman-direct

2 late 1965.

3 Q What did Mr. Mrs. Schroeder say to you?

4 A "We are having a problem with Musicor. Don't  
5 make -- whatever you do don't make any commitments on our  
6 behalf".

7 THE COURT: I am not clear.

8 Is this the same conversation or a different  
9 conversation from the one telling you the kind of  
10 licenses to issue?

11 THE WITNESS: This was the same conversation.

12 THE COURT: I know you have been asked  
13 several times about the date. What have you told us?

14 A My best memory is very early in 1966 or late in  
15 1965.

16 THE COURT: Give us the whole conversation, would  
17 you please?

18 THE WITNESS: The conversation in general was that  
19 "We are having a legal problem with Musicor Records. From  
20 this point on issue all licenses and records manufactured  
21 rather than manufactured and sold and don't enter into any  
22 agreements or commitments on our behalf."

23 They were aware that we had an audit procedure  
24 and they wanted to make sure that we did not settle anything  
25 on their behalf although at that time as I recall we had not



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2 even started the audit.

3 Q This was all as to that one conversation?

4 A Yes.

5 Q "Manufactured only on records and don't make any  
6 commitments on our behalf"?

7 A Yes.

8 Q Isn't it a fact that there must have been a  
9 second conversation in which they affirmatively asked you  
10 to audit the books of Musicor?

11 A I don't remember such a conversation. Individual  
12 publishers -- they may ask us to do an audit of a record  
13 company. It is not our procedure to audit record companies  
14 based on individual requests.

15 At periodic intervals we audit and we don't  
16 deviate from that.

17 Q Isn't it unusual to have segregated the Schroeder  
18 groups in your first audit?

19 A Yes.

20 Q Didn't that result from the fact that Mr. and  
21 Mrs. Schroeder had asked the Harry Fox office to pull an  
22 audit of Musicor at that time?

23 A They knew we were going to audit Musicor records and  
24 they wanted to have an idea of what the obligation may be.

25 THE COURT: Was this a conversation, to the best of

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2 you memory?

3 A During the conversation I had with Mr. and Mrs.  
4 Schroeder --

5 THE COURT: The same one?

6 THE WITNESS: Yes. It was one conversation. The  
7 indication was at that time that we were preparing to audit  
8 Musicor Records and at that particular time they asked me to  
9 include them in the audit because they wanted to have some  
10 idea of what the indebtedness might be.

11 THE COURT: Did they specifically say anything  
12 about whether you can or could not settle the audit after  
13 it had been made?

14 THE WITNESS: No. But I know the procedure  
15 of publishers. When there is litigation this office does  
16 not in effect try to get involved in anything. We step  
17 aside.

18 THE COURT: This was not my question.

19 I am asking you because I think I got a little  
20 different understanding from your testimony before: You  
21 said that the Schrodgers told you to include their accounts  
22 in the audit so they could know how much was owed.

23 THE WITNESS: Yes.

24 THE COURT: Did they say anything specific about  
25 whether after such audit you could or could not settle?



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THE WITNESS: No. They did not say anything specific.

THE COURT: Did they tell you anything in general about making no commitments on their behalf?

THE WITNESS: Yes.

THE COURT: Did you understand that to have any effect on your ability to settle the forthcoming audit?

THE WITNESS: Yes.

Q What was the effect you understood?

A Not to include them in any settlement.

Q Mr. Berman, the fact of the matter is you did include them in a settlement, did you not?

A No. The fact is not that. I did not settle this particular audit. This particular audit was settled between Mr. Fox and Mr. Talmadge. I was not present.

Q You have no knowledge as to what the conversations were between Mr. Fox and Mr. Talmadge other than I assume possibly hearsay from what you heard from Mr. Fox or around the office; would that be fair?

You had no conversation with Mr. Talmadge yourself?

A I had no conversation with Mr. Talmadge myself.

Q You do not know what was said between Mr. Talmadge and Mr. Fox other than by hearsay?

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Berman-direct

A I know what Mr. Fox told me.

Q That is all you know?

A That is all I know.

Q As a matter of fact, in the audit report which you sent onto Mr. Talmadge for purposes of discussion, you went very heavy on the Schroeder companies, didn't you?

THE COURT: No. I know that that was included in the audit.

Q When you sent the audit to Mr. Talmadge, you raised the questions concerning the reserves that were being kept and various matters pertaining directly to the Schroeder accounts, did you not?

A Yes.

Q Wasn't that a prelude to a settlement.

A No. That was just an audit claim.

Q What happens after audit claims is that there is a settlement?

A Yes.

Q And in this case there was a settlement, wasn't there?

A Yes, but it did not refer to that claim.

THE COURT: It could or could not be included or excluded.

Is Mr. Fox dead?



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Berman-direct

2 THE WITNESS: Yes.

3 THE COURT: Is there any record of that settle-  
4 ment?

5 THE WITNESS: I have a copy, my copy, of the audit  
6 report and there is a notation --

7 THE COURT: One step at a time. I think you  
8 testified earlier there was a settlement and an amount  
9 was paid.

10 THE WITNESS: Yes.

11 THE COURT: Does your firm have records embodying,  
12 recording, the times of that settlement, who the payment  
13 was made to after you had received it by Musicor? In other  
14 words, does it have records about that settlement and what was  
15 done with the proceeds?

16 THE WITNESS: Yes. We have a record of having received  
17 two checks from Musicor in payment of the audit and we have  
18 a record that in 1970 we disbursed the \$11,000. to the  
19 publishers who the audit was settled for.

20 THE COURT: Was any of the money disbursed  
21 to January, Arch or Sealark?

22 THE WITNESS: No.

23 Q Did you maintain any reserves for January, Arch  
24 or Sealark?

25 A No.

20 pgr

Berman-direct

Q As a matter of fact, do you have any writing  
whatsoever in which you communicated to Musicor that you  
were not settling and that you were not authorized to settle  
for the Schroeder companies?

A In this audit, no.

Q None at all?

A No.

Q If there were any communications to Talmadge,  
you are saying if there were any such, it would have been  
done by Mr. Fox, not you?

A Yes.

Q You said there is no writing and orally you  
yourself never advised the Talmadges that after the audit and  
the protests about the Schroeder accounts that there  
was nevertheless not to be an inclusion of the Schroeders  
in the settlements?

A Never.

Q After the conversation you say took place in which  
the Schroeders told you as you have described to his  
Honor, the fact is that the Harry Fox agency did accept  
moneys from Musicor for the Schroeder accounts, isn't that  
so?

A No.

Q Do you remember testifying in a deposition



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2 given in this case?

3 A Yes.

4 Q Didn't you testify that after the conversation  
5 with the Schroeders your agency nevertheless accepted  
6 payments from Musicor on their behalf?

7 A Possibly for quarterly accounting but not for an  
8 audit settlement.

9 Q Did the Schroeders indicate to you you should  
10 not accept them for a quarterly accounting?

11 A Yes.

12 Q You accepted them any way?

13 A We may have. We represent many publishers. We get  
14 thousands of accountings every quarter. We may have  
15 accepted it. I don't know for a fact.

16 Q Nor do you know for a fact that the settlement  
17 of audit No. 1 included the Schroder groups or didn't include  
18 the Schroeder groups?

19 THE COURT: That was something Mr. Fox told you.

20 THE WITNESS: Yes.

21 THE COURT: Anything else about that audit No. 1?

22 Q You never told Musicor at any time that you  
23 were instructed by Schroeder to stop taking payments, did  
24 you?

25 A I don't recall. When you say "at any time",

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2 are you talking about quarterly accounting or audit?  
3 are you talking about quarterly accounting or audit?

4 Q Both.

5 A Certainly as far as audits are concerned they  
6 knew we were not in a position to act on their behalf.

7 Q You never told them?

8 A In the third audit they were specifically told --

9 Q I am not at the third.

10 A As far as the first audit prior to Mr. Fox's  
11 meeting with Mr. Talmadge I cautioned him --

12 MR. COHN: I object to conversations between --

13 MR. RICH: I would like the witness to answer.

14 MR. COHN: You would love it. But I object to a  
15 hearsay conversation between this witness and Mr. Fox.

16 MR. RICH: Mr. Fox is deceased. There is no  
17 prohibition about this conversation under the dead man  
18 statute in New York.

19 As a matter of fact, there is no prohibition on  
20 this at all and Mr. Berman can certainly testify to a  
21 conversation that he had with Mr. Fox concerning this particu-  
22 lar matter.

23 MR. COHN: Mr. Rich sounds very sure. As a matter  
24 of law I don't see how it is possibly admissible.

25 THE COURT: A conversation between Mr. Berman and  
Mr. Fox? Mr. Berman and Mr. Box were both employed by





1 23 pgbz Berman-direct  
2 the agency representing plaintiffs.

3 MR. RICH: If I could speak up on this and  
4 address myself to this point.

5 THE COURT: I will receive it subject to a motion  
6 to strike. I don't want the witness having to come back.  
7 If it has to be stricken I will strike it. Let's have the  
8 conversation.

9 Before the settlement of the first audit you gave  
10 certain information to Mr. Fox, right?

11 A Mr. Fox was not a man for detail and prior to  
12 his going into any audit he wanted to know generally the  
13 parameters of the settlement. I advised him concerning  
14 the dollars. I advised him that there was litigation,  
15 possible litigation, with the January group of publishers  
16 and he said to not include them in the audit.

17 THE COURT: You said what?

18 A I told Mr. Fox that there was litigation or  
19 pending litigation with the January group of music publishers  
20 and he should not include their interests in the audit  
21 settlement. After he had spoken to Mr. Talmadge and when  
22 he came back he told me that he did not include their inter-  
23 ests in the settlement.

24 Q Can you explain why if their interests were not to  
25 be included in a settlement in your covering letter accompany-

24 pgbr

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ing the audit report you made absolutely no reference to  
that fact to Musicor?

A It was a form letter. We write that same type of  
letter to all record companies when we submit audits.

Q Can you give an explanation as to why in the  
contents of the audit report itself, after all the time  
and attention given to the problems between Musicor and the  
Schroeder groups, no reference to the fact: But by the way  
we are not supposed to be bothering with the Schroeder  
groups?

A This is an audit report submitted by our  
accountants. We don't -- this report is not submitted by  
the Fox office. It is submitted by our accountants and they  
just put it down as they see it in the books.

Q It is then sent by you to the licensee with an  
invitation to come in and settle?

A Yes.

Q This is the last time I ask: Is there anything in  
writing or any indication in the covering letter in the  
report itself or elsewhere that having gone through an  
audit of many months covering the Schroeder companies,  
is there any exception as to the settlement contained in  
any of the correspondence you sent to Musicor?

A

No.



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THE COURT: The settlement was not embodied in correspondence, as I understand it?

THE WITNESS: No.

Q It was embodied in the acceptance of two checks, neither of which --

THE COURT: Wait a minute. There was -- you talk about correspondence. There was no correspondence from Fox to Musicor embodying the terms of the settlement, right?

A That is right.

Q In the acceptance of the checks in settlement of this matter was any exclusion made, the checks or any place else, as to the Schroeder companies?

A No.

Q Were the defendants in this case notified in any way by you that the settlement did not cover --

THE COURT: We have had that three or four times. Let us go on.

Second audit: It is stipulated there was no settlement for the plaintiffs. There was an amount paid by Musicor?

A Yes. On account.

THE COURT: What was done with that amount of money?

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2 A That money is still being held pending final  
3 settlement of the audit.

4 Q Is part of that to be allocated to the Schroeder  
5 companies?

6 A If they are excluded, no.

7 Q Whether they are excluded or not --

8 A At the present time if Mr. Talmadge said we have  
9 to settle this it would be settled excluding the January  
10 group.

11 THE COURT: I don't understand.

12 Who negotiated or whatever happened about the  
13 receipt of the money on account? Who made those arrange-  
14 ments?

15 THE WITNESS: I did.

16 THE COURT: That amount of money was \$25,000?

17 THE WITNESS: At least that. I think it might have  
18 been more.

19 Q With reference to the second audit, Mr. Berman,  
20 isn't it a fact that there was no division of the claims  
21 your office made in connection with that audit between  
22 the Schroeder companies and any of your other publishers?

23 A There was no division.

24 Q The fact is you audited without segregation in  
25 behalf of the Schroeder companies as well as on behalf of



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2 your own publishers?

3 A Yes.

4 Q Is it also a fact that there was no exclusion in the  
5 second audit from a consideration of the Schroeder interests  
6 in the settlement?

7 A There was no settlement of the second audit.

8 Q In the discussions concerning a settlement is it  
9 not a fact that there was no exclusion of the Arch Corporation  
10 -- I will call it the Schroeder interest -- with reference  
11 to being included in the settlement?

12 A Read that question back.

13 (Read.)

14 A We never got to the point of an actual settlement.  
15 There was no reason to discuss the inclusion or exclusion  
16 of any area.

17 Q I have to make an assumption with you. You are  
18 saying it was not discussed as to whether the Schroeders  
19 were going to be included or not?

20 A We did not reach a final figure.

21 Q I understand your testimony. I am coming to that  
22 in a minute to see whether or not a final figure was  
23 reached. My question now is:

24 Was there a difference between the first and  
25 second audits insofar as the proposed applicability of

1 28 pgr Berman-direct

2 a settlement to the Schroeders?

3 A I don't understand the question.

4 Q Were the Schroeders at the time there was  
5 an attempt to reach a settlement with reference to the  
6 second audit, were you talking for the Schroeders as  
7 well as the other publishers?

8 A No.

9 Q Do you remember giving a deposition in this  
10 case?

11 A Yes.

12 Q Did you say the same thing in that deposition?

13 A I don't recall.

14 THE COURT: Read it and save time. If it is  
15 contrary --

16 MR. COHN: All right, your Honor.

17 Q In the case of the second audit you made no  
18 segregation and you did not even give to the Schroeder  
19 companies the information as to the applicability to them,  
20 did you?

21 A That is correct.

22 Q You declined to do so. I sa "declined". You  
23 respectfully declined to do so?

24 A That is right.

25 Q Did you say in word or substance to the Schroeders



1 29 pgbr

Berman-direct

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2 "Look, Musicor has grown itself much bigger now. We have  
3 to do this on an across the board percentage basis for  
4 everybody".

5 A Yes.

6 THE COURT: What did you refuse to do?

7 THE WITNESS: Give them a copy of the audit report.  
8 I gave them a copy of the first audit report because they  
9 could specifically examine it and know fairly concretely  
10 just how much was due their group of companies. They could  
11 not do this by examining the second audit claim.

12 Q Did you say to them in word or substance with  
13 reference to the second claim "Musicor has grown substantially  
14 from the time of the first audit. We cannot spend an  
15 inordinate amount of time on this. The auditors must  
16 proceed on a percentage basis covering what they determine  
17 as the Harry Fox percentage of all publishers represented"?

18 A Yes.

19 Q So in other words --

20 MR. RICH: May I have a reference to the page?

21 Q That is your testimony now?

22 A Yes.

23 Q When it came to the second audit you could not  
24 bother including the Schroeders or segregating the Schroeders  
25 or anything else. You didn't have the mechanical facilities?

1 30 pgbr

Berman-direct

2 A That is right.

3 Q But your testimony is that even if we now have the  
4 Schroeders included in the second audit with no limitation  
5 on settlement, your testimony is that it is academic because  
6 we never settle for anybody, is that right? There was no  
7 settlement for anybody?

8 A That is correct.

9 Q As a matter of fact there was a settlement in  
10 the exact sum of \$25,000 for everything other than a \$14,000  
11 item covering free records, was there not?

12 THE COURT: You are talking about the second  
13 audit?

14 THE WITNESS: I don't recall the details of the  
15 discussions we had. I had several discussions  
16 with Mr. Talmadge on the second audit and the first account-  
17 ant and the second accountant and with our attorney and  
18 we never reached anywhere near a decision, so the \$25,000  
19 that you are talking was a payment on account to indicate  
20 that he acknowledged that there was an indebtedness and  
21 we would -- in effect it was a good faith deposit that he  
22 would come in and discuss further a final figure.

23 THE COURT: I don't understand. Is there anything  
24 in writing embodying the payment of \$25,000 or whatever it  
25 was in stating the conditions under which it is being paid



31 pgr

Berman-direct

and what is to be done with it? Is there anything in writing?

A Nothing specifically in writing to my recollection. There is a series of letters indicating after the payment of \$25,000 was made that we still had a continuing problem in settling the audit. It was very clear that this was not a settlement.

THE COURT: When you were given the \$25,000 you were to hold it pending further directions or pending agreements, right?

THE WITNESS: Yes.

THE COURT: It was not given to you to pay to anybody ultimately. It was simply to be held?

THE WITNESS: That is right.

THE COURT: You hold it now?

THE WITNESS: I do.

THE COURT: If for any reason there was just no agreement ultimately would it be returned if it belonged to Mr. Talmdage?

THE WITNESS: No. It was not a deposit. It was a payment on account and there would have to be an agreement as long as Musicor was liable.

THE COURT: You knew that certain amounts were owing?

1 32 pgbr

Berman-direct

2 THE WITNESS: Yes.

3 THE COURT: If it turned out to be less than 25  
4 by some strange --

5 THE WITNESS: It would be very strange.

6 THE COURT: If it did you would refund?

7 THE WITNESS: If by some reason it turned out to  
8 be less than a \$25,000 the difference would be refunded to  
9 Musicor.

10 Q Was there any discussion as to which companies  
11 or which accounts the 25,000 was applicable to or was it  
12 not pinned down in such fashion?

13 A It was not pinned down.

14 Q Would you draw on your recollection and tell us  
15 who is your lawyer, Mr. John --

16 A The attorney, Mr. John Clark.

17 Q Isn't it a fact that after the final meeting at-  
18 tended by Mr. Clark and the others it was agreed that \$25,000  
19 would be paid in settlement of the audit with the only  
20 remaining item being a \$14,000 claim for fees, which was  
21 not settled because there was a dispute which involved a  
22 further change of records between the Harry Fox office  
23 and Musicor?

24 A I don't recall that.

25 Q Do you recall one way or the other?



1 33 pgr

Berman-direct

2 A No. I recall there was a vast gap between the two  
3 parties as to what was due.

4 Q Do you recall a dispute in the course of which  
5 you wanted certain records from Musicor and they wanted  
6 certain breakdowns from you involving frees?

7 A I don't recall.

8 Q You don't recall that at all?

9 A No.

10 Q You do recall that the sum of \$25,000 was  
11 paid toward a settlement?

12 A Yes.

13 Q And at least insofar as this \$25,000 was paid and  
14 accepted, that sum was toward a settlement.

15 A Yes.

16 Q But you do not recall that the only open item was  
17 a \$14,000 item involving frees?

18 A I don't recall.

19 Q You don't recall the dispute over a change of  
20 records --

21 THE COURT: Again and again and again.

22 Let us go to the third audit.

23 Q With reference to the third audit, did you audit  
24 in behalf of the Schroeder companies as well as your  
25 other clients?

34 pgr

Berman-direct

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Q Mr. Steinberg was in the discussions?

A Yes.

Q After discussions was a settlement figure arrived  
at?

A Yes.

Q Was that settlement figure approximately \$21,000?

A Yes.

Q Was the settlement reached in that amount  
initially?

A We had taken the figure originally claimed and after removing the reserve and other areas we reached the figure of 21,000 too.

Q By the way, that \$21,000 settlement figure included the Schroeder Company, did it not?

A That was not a settlement figure. That was a figure that we arrived at after going over the audit. The audit claim -- I don't recall. You have the audit. It was --

THE COURT: Exhibit 12. Let us get Exhibit 12.

Q Was there any difference between this \$21,000 and the \$11,000 in the first audit?

A Yes.

Q I know there was a difference in amount. Was there any difference in format?



1 35 pgbr

Berman-direct

2 A Yes. This one, I knew what I wanted to do and I  
3 know what I did.

4 Q The figure you came up with was \$21,000?

5 A That was the figure.

6 Q That was agreed to, as I understand it, by Mr.  
7 Steinberg?

8 A Yes.

9 Q You said 21,851.94 and Mr. Steinberg said okay.

10 THE COURT: I think you said this was a figure  
11 arrived at after doing something. After doing what?

12 A May I see the original?

13 The original audit claim was in the amount of  
14 \$141,000. After going over the audit with Mr. Steinberg  
15 and eliminating the reserves and eliminating other areas,  
16 we reached a figure that changed the 141,000 to \$21,000.

17 Q That included in that 21,000 the Schroeder  
18 companies?

19 A Yes.

20 Q After having reached agreement with Mr. Steinberg  
21 for that 21,000, call the settlement or acceptance of your  
22 figure by Mr. Steinberg or whatever you want to call it,  
23 after you and he had a meeting of the minds and you said  
24 21 and he said okay, 21, then for the first time did you  
25 write Mr. Steinberg a letter and say "Hold back approximately

1 36 pgbx

Berman-direct

2 three or \$4,000 relating to the Schroeder companies and  
3 send me a check for the balance of \$17,000"?

4 A Prior to my letter to Mr. Steinberg at the time  
5 we discussed the audit I said, "You know we are not in a  
6 position to settle the audit on behalf of the Schroeder  
7 group of companies and we will have to arrive at some  
8 formula that will eliminate them from the audit settlement.

9 THE COURT: When did you say that?

10 THE WITNESS: At a meeting with Mr. Steinberg,  
11 and after discussion we, I think, reached an arbitration  
12 figure of 5 per cent and this was just a figure that we  
13 arrived at so that there could be no question, as on audit  
14 1, that the Schroeder interests were not included in the  
15 settlement.

16 Q It was not as clear as that. The \$21,000 figure  
17 did include the Schroeders?

18 A Yes.

19 Q What I am getting at with you, did the exclusion  
20 come after the settlement was made or before?

21 A It was all of a package. The exclusion came  
22 during our conversation. He knew I could not include their  
23 interest.

24 Q When you testified in your deposition you were not  
25 as clear on this conversation, were you?



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Berman-direct

A I don't think we ever reached that.

Q Didn't you reach a point where you said the best you could say is you felt you were not settling on behalf of the Schroeders?

MR. RICH: What page?

MR. COHN: 41.

A Yes.

Q By the way, Mr. Berman, everything is done and has to be done on a very informal basis, doesn't it?

A Yes. In great measure.

Q You have an enormous, broad discretion, right?

A Yes.

Q That is the only thing that makes the Harry Fox thing workable?

A Yes.

Q There has to be a lot of looseness in the give and take?

A Yes.

MR. RICH: I ask at this time that we can read in the whole portion of the transcript testimony that Mr. Cohn referred to just to make the record clear. That specific thing --

MR. COHN: I will read it.

1 38 pgbr

Berman-direct

2 MR. RICH: Page 4.

3 MR. COHN: "I thought you said earlier in the  
4 first audit and the third you specifically included January,  
5 Arch and Sealark. We are talking about the third audit  
6 here, is that right"?

7 MR. RICH: I will stipulate to that.

8 MR. COHN: "A I said I specifically  
9 excluded them in the settlement. My exclusion was on an  
10 arbitrary basis. I felt we were not settling on their behalf.  
11 We took a reduction specifically on a negotiated basis."

12 Q Did you say that?

13 A Yes.

14 MR. RICH: Continue with the next question and  
15 answer.

16 MR. COHN: I would like to finish my examination.  
17 It is a quarter of six now.

18 Q Do you have any writing preceding your letter to Mr.  
19 Steinberg in which you said for the first time "Exclude the  
20 Schroeders from the settlement figure?" Was there any  
21 prior writing in which you said the settlement was not to  
22 cover the Schroeders?

23 A Not to my knowledge.

24 MR. COHN: I have no further questions.

25 THE COURT: When you agreed on this 5 per cent



1 39 pgbr

Berman-direct

2 reduction, was the 5 per cent applied to the \$21,851.94?

3 A That reduced the reserve to \$17,000.

4 THE COURT: What amount was paid on the settle-  
5 ment?

6 THE WITNESS: The full amount, 17,000.

7 THE COURT: Do you have any cross examination?

8 MR. RICH: Yes, I do.

9 THE COURT: Is the other lawyer here?

10 MR. COHN: No, your Honor. We have a phone  
11 message from him. He can't make it. We are all coming back  
12 here on the 25th. He might as well join the party.

13 CROSS EXAMINATION

14 BY MR. BERMAN:

15 Q Mr. Berman, you mentioned you testified about a  
16 conversation that you had with Harry Fox and I believe you  
17 testified that you told Mr. Fox that the January, Arch and  
18 Sealark companies were to be excluded from any settlement,  
19 referring now to the first audit, and that you had a  
20 conversation with Mr. Fox after he returned back from his  
21 discussions with Musicor and he told you that he excluded  
22 these companies from the settlement.

23 THE COURT: What do you want to ask?  
24 I remember that. I have no notes. What is your question.

25 MR. RICH: I have to lead into a question

1 40 pgr

Berman-cross

2 somehow.

3 Q Did you make a note of your conversation with Mr.  
4 Fox after Mr. Fox returned back from his meeting with  
5 Musicor?

6 A Yes.

7 Q Would you produce that, please?

8 A On the file copy of the audit after Mr. Fox came  
9 back you put a note "Per HF settlement does not include  
10 January group which is in litigation."

11 MR. RICH: Your Honor, I believe the copy of  
12 this note that Mr. Berman made is already included in --

13 THE COURT: Why did we even have to read it;  
14 if it is in evidence I can read it. It is a quarter of  
15 six.

16 MR. RICH: Your Honor --

17 THE COURT: If something is in evidence my  
18 attention can be directed to it.

19 MR. RICH: I had to ask him if he is the one that  
20 wrote it and when it was written and under what circum-  
21 stances.

22 THE COURT: Do you have any other cross? That is  
23 all, you have to answer. It is very simple.

24 I take it this is on Exhibit 10?

25 MR. RICH: That is right.



1 41 pgr

Berman-cross

2 THE COURT: Next question.

3 Q Mr. Berman, you testified with regard to a conver-  
4 sation that you had with Mr. and Mrs. Schroeder, I believe,  
5 in about 1965 to possibly 1966. You said this was the same  
6 conversation that you had with Mrs. Schroeder earlier.

7 The conversation that you testified to earlier --  
8 and I want to make sure that your recollection is cor-  
9 rect, you said took place prior to the execution of the  
10 licenses which I think it has been agreed was the latter  
11 part of 1964. So I am asking if this could have been two  
12 conversations, one with regard to the licenses and the other  
13 with regard to the exclusion?

14 A I don't recall.

15 Q Mr. Berman, after your discussion with Bob  
16 Steinberg that you testified to earlier, did you make a  
17 note or memorandum about that discussion?

18 A Yes.

19 Q Is this your office of that conversation?

20 A Yes.

21 Q Concerning that conversation?

22 A Yes, it is.

23 MR. RICH: I ask this be marked as Exhibit 13  
24 and I offer it.

25 THE COURT: Any objection?

1 42 pgbr

Berman-cross

2 MR. COHN: Sure. What is the point to it?

3 He testified to the conversation. If he goes back and makes  
4 the --

5 THE COURT: Is there an objection?

6 MR. COHN: Yes.

7 THE COURT: Overruled.

8 MR. COHN: He can use it to refresh his recollection  
9 but how does it refresh his recollection?

xx

10 (Plaintiffs' Exhibit 13 is received in  
11 evidence.)

12 THE COURT: At most it is cumulative and Mr.  
13 Steinberg is here. He can give his version if this is not  
14 accurate. I don't think it's of any har.

15 Anything else?

16 Q Mr. Berman, did you receive any correspondence  
17 from anyone representing Musicor showing the audit figures  
18 concerning the third audit and excluding the Arch, Sealark  
19 and January companies?

20 A Yes. Mr. Steinberg gave me a work sheet in which  
21 he delineated the points we had agreed upon.

22 Q This is actually a copy of a letter that I received  
23 from your files from Mr. Steinberg to you together with a  
24 schedule and I ask you if that is what you had received?

25 A Yes.



43 pgbr

Berman-cross-redirect

MR. RICH: I ask this be marked as Exhibit 16.

THE COURT: You are offering it?

MR. RICH: Right. I would offer it.

MR. COHN: No objection.

(Plaintiffs' Exhibit 16 was received in evidence.)

Q One other question, if I may, going back to a point before, Mr. Berman's earlier testimony.

Mr. Berman, after Harry Fox Agency sent the licenses which are marked as Exhibits 1-A through F and 2, 3 and 4, did anyone ever return those licenses back to the Harry Fox Agency unsigned?

A No.

THE COURT: Is that all?

MR. RICH: Yes, your Honor. That is all.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. COHN:

Q Do I understand you are now reconsidering the testimony you gave on direct with reference to your response to the Court's question as to whether the conversation about the licenses and the inclusion in settlement took place in one phone conversation?

A I didn't change that. I said in response to

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1 44 pgr

Berman-redirect

2 Mr. Rich's question, I said I didn't recall whether it was  
3 one or two conversations.

4 Q You were quite definite in responding to the  
5 Court. You said it was one conversation.

6 A As I recall it was one conversation.

7 Q You still recall it to be one conversation?

8 A Unless somebody tells me differently.

9 Q Unless somebody tells you differently?

10 A Somebody can prove it to me.

11 THE COURT: He says you will have to have another  
12 witness.

13 Thank you, Mr. Berman. Sorry you had to wait  
14 all day. It is over with.

15 9:30 next Wednesday, the 25th. The only witness  
16 will be one or both of the Schroeders and to the extent  
17 necessary Mr. Straus and Mr. Steinberg.

18 MR. COHN: And Mr. Moelis.

19 THE COURT: And Mr. Moelis.

20 As I understand it, the only purpose of calling Mr.  
21 Straus and Mr. Steinberg would be on this subject of free  
22 records?

23 MR COHN: I call Mr. Steinberg on the question  
24 of conversations with Mr. Berman in connection with the second  
25 and third audits.

THE COURT: Those are the issues we will take up.



1 45 pgr

2 I think we can make use of Mr. Rich's letter of  
3 January 12th in this respect. I am going to assume that  
4 the figures in that schedule at the end of Mr. Rich's  
5 letter are correct in delineating the claims based on  
6 licenses which say manufactured.

7 MR. RICH: Which letter is that?

8 THE COURT: I am sorry. Mr. Straus' letter of  
9 June 12th. Let me put it this way: I am going to assume  
10 that of the four claims referred to in that schedule the  
11 amounts under the heading Manufactured are based on exhibits  
12 on licenses and Exhibits 1, 2, 3, 4, and that I don't have  
13 to go through a detailed schedule of each claim.  
14 Are you with me at all?

15 MR. COHN: I am awfully tired. I can't honestly  
16 tell you I am following but I am sure it is all right.

17 THE COURT: I want to avoid next Wednesday or  
18 any Wednesday having to go through license-by-license  
19 and I think -- just keep in mind that we can use Mr. Straus'  
20 letter with respect to that schedule at the end.

21 MR. COHN: We have their set of licenses,  
22 our set of licenses, and your Honor is saying if you  
23 find United licenses prevail that is that. If you find  
24 that some licenses they introduce prevail, that is that.  
25 If you find that their licenses prevail but have been

1 46 pgr

2 modified by custom and usage -- you don't want a dispute  
3 as to what the dollars would be -- you want the dollars  
4 to fit into your legal finding.

5 THE COURT: I will use, unless told otherwise,  
6 I will use the dollars referred to in the schedule to  
7 Mr. Straus' letter. I think that is fair.

8 MR. COHN: The only alternative would be to submit  
9 it to the Harry Fox office for arbitration.

10 MR. RICH: Before we leave, one word: With regard  
11 to the request for the production of documents that I made,  
12 in order to be sure that we don't receive part of all the  
13 licenses but all the licenses, I would also like whatever  
14 documentation --

15 MR. COHN: It is too late for me to hear  
16 Mr. Rich repeat for the fifth time --

17 THE COURT: You have made your request.

18 MR. RICH: This is in addition.

19 THE COURT: If it is not complied with you call my  
20 office. I will be here next Tuesday afternoon.

21 MR. RICH: I want to make sure it is complied  
22 with. I am asking for documentation showing the records  
23 released during the period I have requested the licenses to  
24 make sure that Musicor does not omit furnishing us with a  
25 whole group of licenses. We would like to compare the



1 47 pgr

2 licenses against the records that were released during that  
3 period.

4 THE COURT: Mr. Steinberg, I don't want to worry  
5 about this. The request and the obligations to submit, dig  
6 out, all licenses issued to Musicor from anybody between  
7 May 1964 and the end of 1965, and I have no doubt you are  
8 going to do it and you are not going to burn any or throw  
9 any away.

10 MR.STEINBERG: That is right, your Honor.

11 (Adjourned to Wednesday, June 25, 1975, at  
12 9:30 a.m.)  
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2 January Music Corporation, etc.

3 v.

68 Civ. 4138

4 Musicor Record Corporation, et al., etc.

5 New York, New York

6 June 25, 1975

11:00 a.m.

7 - - -

8 (Trial resumed.)

9 - - -

10  
11 THE COURT: One thing I want to take care of  
12 at the outset is the matter which Mr. Beldock raised,  
13 and I have been thinking more about that -- and Mrs. March  
14 has looked up the law on the point, the position of the  
15 distributors. Nobody has really briefed this. At least,  
16 Mr. Rich, I do not think you have, and I do not think we  
17 really have a basis for going on with the distributors,  
18 and I do not see any reason not to dispose of that right  
19 now. The way the action shapes up now, according to our  
20 stipulation, this is now a contract action. You are  
21 suing -- your clients are suing on the licenses, and  
22 the party liable on the license is the licensee, and I do  
23 not see holding as liable someone who wasn't a party.

24 What is your argument, and where have you  
25 briefed the liability of the distributors?



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2 MR. RICH: Your Honor, I do not have the cases  
3 with me right now but the law is very clear that in case  
4 of copyright infringement, as this is, we are claiming that  
5 the licenses were terminated, that Musicor continued to  
6 manufacture and continue to sell the recordings containing  
7 the musical compositions involved after the licenses --

8 THE COURT: Look, Mr. Rich, I cannot have this  
9 kind of weaving around on the argument.

10 MR. RICH: It is a simple position. This is a  
11 copyright infringement. The licenses were terminated.  
12 Musicor continued to manufacture, continued to sell records  
13 containing these songs after the licenses had been termin-  
14 ated. Therefore they were manufacturing and selling them  
15 without any license, without any authority, without any  
16 right -- obviously a copyright infringement. The law is  
17 clear that if a party continues to do that, if they continue  
18 to manufacture or they have manufactured without a license,  
19 it is an infringement. The law is also clear that anybody  
20 who had anything to do with that manufacture and sale is  
21 liable for copyright infringement, including if Walgreen's sold  
22 the albums, they would be liable in a copyright suit.

23 Your Honor, as I say, I do not have any cases --

24 THE COURT: Nor have you briefed it.

25 MR. RICH: Oh, sure.

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2 THE COURT: Oh, sure! I will hand you your  
3 briefs and you point out where it is briefed.

4 MR. RICH: Your Honor, I have not briefed it in  
5 this particular case -- it has not come up at this point.  
6 This was a situation where briefs are handed in after the  
7 trial. I have briefed it often enough in other cases.  
8 I know your Honor has Nimmer on Copyright. I think  
9 we are making specific references to that. I think I can check  
10 that right now, but the law is clear that if there is a  
11 copyright infringement, if somebody is manufacturing or  
12 selling records without a license, he is an infringer, if  
13 we have a right to terminate the license.

14 THE COURT: Look, Mr. Rich, there was filed on  
15 October 18, 1968 a complaint of some 244 pages.

16 Thereafter, with practically no discovery, or any  
17 other moves on the part of the plaintiffs here, there was  
18 a note of issue filed some time in 1970. Thereafter,  
19 again with practically no moves on the part of the plaintiff  
20 in this action, I began to try to get the case ready for  
21 trial, and I have had -- I won't attempt to count them;  
22 I don't need to but I have had conferences on the record  
23 and conferences off the record in a very difficult quest  
24 to get the issues in this case pinned down for trial.

25 I have made my remarks on the record as to the



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2 difficulty of understanding the plaintiffs' claims in  
3 this case. They were incomprehensible to me. They were  
4 incomprehensible to me after you filed your so-called  
5 statement of facts. They continue to be incomprehensible to  
6 me until late this spring when we began to get down to  
7 brass tacks in the pretrial conferences.

8 As a result of all that effort, which should have  
9 been carried out by the attorneys in discovery, in  
10 interrogatories and so forth, we finally arrived at a  
11 stipulation on June 5th on which we are going to  
12 trial and went to trial, and your claims are therein  
13 specified, and it is clear from that stipulation that  
14 your claims are based on the licenses which you have  
15 introduced into evidence as Plaintiffs' Exhibit 1, 2, 3 and  
16 4. There was nothing -- not one word in that stipulation  
17 about any issue about termination of the licenses or claims  
18 for statutory infringement thereafter.

19 I will tell you right now that I am not treating  
20 this case as an infringement action. I think the record  
21 is abundantly clear as to my reasons for not treating  
22 it. I am not going to hear evidence nor have you suggested  
23 at any time will you introduce evidence about termination  
24 of these licenses.

25 This issue was posed in your original pretrial

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2 submission. It was not posed in the submissions and  
3 stipulations which we ultimately worked out, and I am  
4 simply not going to entertain that contention. This case  
5 is being tried and will continue to be tried during the  
6 balance of the trial, which is going to be today, and  
7 that will be the end of it. This case is being tried on  
8 the basis of your alleged license agreements contained in  
9 Plaintiff's Exhibits 1, 2, 3 and 4 -- and that's that.  
10 Now --

11 MR.RICH: May I respond to that, if your Honor  
12 please?

13 THE COURT: Furthermore, Mr.Rich, I made it  
14 perfectly clear to all concerned that I was going to try this  
15 case in one day, or at the most two days, and that I will  
16 hand down an immediate decision, and I am prepared at the  
17 end of today, or whenever this trial concludes -- and I hope  
18 it is before the end of today -- to hand down a bench  
19 decision immediately.

20 I have studied the case between the last session  
21 and this session. Thus far I am aware of the remaining  
22 issues. I will resolve those issues immediately and hand  
23 down a decision.

24 I will not receive post-trial briefs. It was  
25 perfectly clear what my plan was. That was the framework



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2 of the trial for better or for worse. That is the way  
3 I have to conduct it.

4 I cannot have this litigation go on and on  
5 in this indefinite state.

6 Now, you have to work within those rulings,  
7 and to further argue the points just made is going to  
8 prolong this.

9 If I am in error, I am in error, and you have your  
10 appeal, but I will not prolong that issue.

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2 THE COURT: Within that framework, I do not  
3 see any basis for holding in this action Mutual Distribu-  
4 tors, Inc. or Main Line Records. They were not parties  
5 to the license agreements which you are relying on, nor  
6 do I find anything in the statute about the compulsory  
7 licenses, that is Section 1B, nor do I find anything in  
8 the licenses themselves under which I could possibly justify  
9 holding Mutual or Main Line liable for any royalties due  
10 those agreements. I'm perfectly happy to hear you, but  
11 please stick within that framework. The action is under  
12 1E, it's under the license agreements. That is that.

13 MR. RICH: All right, your Honor. I think that  
14 if we go back approximately two years--

15 THE COURT: I'm not going back, and I want you  
16 to confine your remarks to--if you can explain to me why  
17 Malverne--why Mutual and--

18 MR. RICH: Malverne and Main Line, your Honor.

19 THE COURT: Malverne, Mutual and Main Line,  
20 those are the three in the complaint, why those three en-  
21 tities can be held liable under your licenses or under 1E,  
22 I'd be happy to hear it.

23 MR. RICH: Yes, your Honor. Licenses were  
24 originally issued to Musicor, those are the licenses which  
25 are the subject of this action. There came a time when



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2 the licenses were terminated. After the termination of  
3 the licenses--

4 THE COURT: Mr. Rich, you won't hear me. I am  
5 not entertaining arguments at this time about the termina-  
6 tion of those licenses. That is out of the case. It was  
7 not included in the stipulation we entered into, and if I  
8 am wrong, I'm wrong. But I have to be able to rule and I  
9 have to be able to have the counsel obey the ruling, and  
10 if I am wrong, you have an appeal.

11 MR. RICH: If I may just comment on that--

12 THE COURT: You may not.

13 MR. RICH: The stipulation was with regard to  
14 the accounting. The stipulation didn't involve other things.  
15 There had been a stipulation. There is a stipulation that  
16 is part of this action. There is a pre-trial order in this  
17 action in which it was stipulated to certain things.

18 It was stipulated there, for example, that  
19 Talmadge Productions is to be added as a defendant and  
20 Talmadge Productions was Musicor's successor in interest.  
21 The name didn't appear in the title because we have always--  
22 and we have never made a motion because there's been an  
23 order based on a stipulation. We have always--your Honor,  
24 if I may please--

25 THE COURT: I am not going to take time for this,

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2 I'm sorry. I again say I am a human being, I can be wrong,  
3 and a district judge can be just as wrong as can be, but  
4 I am making my rulings and I spent an immense amount of  
5 time and effort which should have been spent by the attor-  
6 neys in this action attempting to get the issues narrowed--

7 MR. RICH: We did, your Honor.

8 THE COURT: And I absolutely will not depart  
9 from the issues as we defined them in our stipulation.  
10 And my understanding is that that washed out any and all  
11 other issues previously tendered in all manner of papers  
12 which have been filed with this Court and all of that is  
13 by the boards. That is the way I am conducting the litiga-  
14 tion.

15 If you can respond, if you can tell me why  
16 these three distributors can be held liable within the  
17 framework I am talking about, that is, under the license  
18 agreements or under Section 1E, I will be happy to hear  
19 your arguments. Otherwise, your argument is extraneous  
20 to my problems.

21 MR. RICH: If Musicor is an infringer, if it  
22 manufactured and sold without the right to do so, without  
23 there being a license, anybody who participated in the  
24 sale of these records that were made without a license is  
25 an infringer, and I think the law is extremely clear on



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2 that.

3 THE COURT: That is extraneous. I will dis-  
4 miss Malverne--I understand that Mr. Beldock, you made a  
5 motion on the 16th to dismiss as to your clients, and I  
6 want to make sure that I have the names of those clients  
7 accurately, because there have been some changes in the  
8 pleadings.

9 MR. BELDOCK: May I read them for the Court  
10 Reporter and your Honor?

11 THE COURT: For instance, I have a brief from  
12 the plaintiffs listing two of them, Malverne and Mutual;  
13 I have a complaint which lists three, Malverne, Mutual and  
14 Main Line. Who do you represent?

15 MR. BELDOCK: The three defendants I represent  
16 are Malverne Record Distributors, Inc.; Mutual Distributors,  
17 Inc.; and Main Line Records, Inc.

18 THE COURT: All right. I will grant your  
19 motion to dismiss under the issues as framed by our pre-  
20 trial stipulation entered June 5th. There is no basis that  
21 I can see holding your clients liable. Your clients, as  
22 I understand it, were not parties to the license agreements.  
23 The liability in this action, if any, is going to be based  
24 on those license agreements and can only be found against  
25 parties to said agreements and those in privity to such

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2 parties and I don't understand ~~any arguments that would in-~~  
3 ~~clude your clients in that category.~~ Your clients are  
4 ~~dismissed.~~

5 MR. BELDOCK: Thank you, your Honor.

6 (Mr. Beldock left the courtroom.)

7 THE COURT: Now, can we get on with the trial--

8 MR. COHN: I have a short witness, a member of  
9 the Bar.

10 THE COURT: Mr. Moelis, is that it?

11 MR. COHN: Exactly.

12 THE COURT: All right.

13 H E R B E R T M O E L I S, having been called as  
14 a witness on behalf of the defendants Musicor and  
15 Talmadge, was duly sworn and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. COHEN:

18 Q Mr. Moelis, what is your name?

19 A Herbert Moelis.

20 Q That is spelled M-o-e-l-i-s?

21 A Correct.

22 Q Are you a member of the Bar of the State of  
23 New York?

24 A Yes, sir.

25 Q For how long a period of time have you been a



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2 member of the Bar?

3 A 18 years.

4 Q Do you practice here in Manhattan?

5 A Yes.

6 Q Where is your office?

7 A 1370 Avenue of the Americas.

8 Q I want to direct your attention back to June  
9 of 1964. Was your office then located on Broadway?

10 A Yes.

11 Q Where?

12 A 1650 Broadway.

13 Q Did you know a man by the name of Art Talmadge?

14 A Yes.

15 Q Did you know a man by the name of Aaron Schroeder?  
16

17 A Yes.

18 Q As a matter of fact, had your law firm represented Mr. Talmadge in connection with certain transactions  
19 concerning the acquisition of an interest in Musicor?  
20

21 A Yes.

22 Q Then you had come to know Mr. Schroeder as a  
23 result of that?

24 A I knew Mr. Schroeder before that.

25 Q You knew Mr. Schroeder even before that?

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2 A Yes.

3 THE COURT: I'm sorry. Did you represent  
4 Talmadge or Schroeder?

5 THE WITNESS: Talmadge.

6 THE COURT: This was in the spring of '64, right?

7 THE WITNESS: Correct.

8 Q And you had known Mr. Schroeder for about how  
9 long before that?

10 A Approximately a year.

11 Q Did there come a time in June of 1964 when you  
12 had a conversation with Mr. Schroeder?

13 A Yes.

14 Q Do you now recall the contents of that conver-  
15 sation?

16 A No.

17 Q Did you embody the contents of the conversation  
18 in a letter which you wrote to Mr. Talmadge?

19 A Yes.

20 Q Is this the letter (handing)?

21 MR. COHN: I show the witness Exhibit LL for  
22 identification.

23 Q Is this a copy of that letter?

24 A Yes.

25 Q Was that letter true and accurate at the time



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2 you prepared it?

3 A Yes.

4 Q And is it signed by you?

5 A Yes, it is.

6 Q Was it prepared approximately contemporaneously  
7 with your conversation with Mr. Schroeder?

8 A Yes.

9 MR. COHN: Your Honor, I would now ask the  
10 Court's leave to read this letter. I am trying to follow  
11 the new Federal rules that a document such as this is to  
12 be read into the record rather than physically received.

13 THE COURT: Let me see it.

14 (Hanging.)

15 THE COURT: That is a discouraging development.

16 MR. COHN: It's funny. It says a memorandum  
17 or record concerning a matter about which a witness once  
18 had knowledge but now has insufficient recollection to  
19 enable him to testify--and so on--may not in itself be  
20 received as an exhibit unless offered by an adverse party,  
21 but the memorandum of record may be read into evidence.

22 THE COURT: I think I better just handle one  
23 thing. I received this on the 16th for the limited purpose  
24 of simply showing it.

25 MR. COHN: I think your Honor is right. I said

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2 for identification. It was received.

3 THE COURT: It was received for a limited pur-  
4 pose. I take it you are offering it for--

5 MR. COHN: Recorded recollection.

6 THE COURT: Yes. Is there any objection to  
7 that?

8 MR. RICH: No, your Honor.

9 THE COURT: So it is received for all purposes  
10 and you may read it into the record.

11 MR. COHN: Thank you, your Honor. Letter ad-  
12 dressed to Mr. Art Talmadge at Musicor Records, dated  
13 June 8, 1964.

14 "Dear Art. Aaron Schroeder says he will allow  
15 a 1.5 cent rate on all pre-1964 recordings only if used in  
16 albums. All new recordings will be as per producer's  
17 agreement at statutory rates. Sincerely, signed Herbert  
18 Moelis.

19 Thank you, Mr. Moelis. I have no further ques-  
20 tions.

21 THE COURT: May I see that letter?

22 (Handing.)

23 CROSS EXAMINATION

24 BY MR. RICH:

25 Q Mr. Moelis, did you represent Mr. Talmadge in

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2 connection with the sale of Mr. Schroeder's stock in Musicor  
3 to Mr. Talmadge?

4 A Yes.

B2 5 Q But you and your partner were involved in that,  
6 is that correct?

7 A Correct.

8 Q Your partner's name was Richard Asher?

9 A Correct.

10 Q As part of the sale of Mr. Schroeder's stock  
11 in Musicor to Mr. Talmadge, there was also simultaneously  
12 entered into between Musicor and Mr. Schroeder a production  
13 agreement; isn't that correct?

14 A I don't recall it.

15 Q Do you recall when the production agreement  
16 or the sale actually took place?

17 THE COURT: Isn't that something we started in  
18 the other day?

19 MR. RICH: No, this is for another purpose,  
20 your Honor. It goes right into this situation.

21 MR. COHN: I think he said he didn't even re-  
22 call the production.

23 Q Do you recall that there was a production?

24 A No.

25 Q Do you recall when the sale took place?

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Moelis-cross

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2 A No.

3 Q Am I correct that other than the letter that  
4 was just shown to you, that you have no independent recol-  
5 lection of your discussion with Mr. Schroeder, as contained  
6 in that letter?

7 A That's right.

8 Q Other than the fact that you have no independent  
9 recollection as to what was said, do you recall whether or  
10 not you spoke with Mr. Schroeder in person or by telephone?

11 A No, I don't.

12 Q Do you recall where that conversation took  
13 place?

14 A No.

15 Q Mr. Moelis, you have been practicing law, you  
16 say, for 18 years. Is it normal for you, once an oral  
17 agreement has been arrived at not to reduce that oral  
18 agreement to writing?

19 MR. COHN: Objected to, your Honor.

20 THE COURT: Let me hear the question.

21 (Question read.)

22 THE COURT: I will allow it.

23 A My best answer would be there are some agree-  
24 ments in the course of business you don't reduce to writing,  
25 in everyday business. It's done all the time.



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Moelis-cross

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Q If a license is granted in connection with a recording, are licenses in writing or are there oral licenses?

MR. COHN: Your Honor, that is objected to, among other reasons, it's far beyond the scope of the direct examination and it's objected to as to form.

THE COURT: Objection overruled.

A Most licenses in the recording industry today in the United States are licenses eventually through Harry Fox, which is in the form of a written license.

Q Do you know of any licenses that were ever granted by a publisher to a record company that were not reduced to writing? I'm speaking about mechanical licenses.

MR. COHN: That is objected to, your Honor.

THE COURT: I guess the point is that--I assume that most of the time the terms of licensing arrangements between publishers and record companies are in the forms of written licenses, right?

THE WITNESS: Yes. Particularly if they go through the Harry Fox Agency.

THE COURT: If that is your point, Mr. Rich, I would assume that. And here we got a question of whether there was an oral agreement. But I assume that most times licenses are written, sure.

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2 Q Do you recall any instance, Mr. Moelis, in  
3 your practice of law--and by the way, your practice of  
4 law did include the representation of record companies?

5 A Yes.

6 Q Record companies other than Musicor?

7 A Yes.

8 Q What other record companies did you represent?

9 A We represented--we were consulting for Columbia  
10 Pictures record division, which was then called Colpix,  
11 and later Colgems, and several other record companies be-  
12 sides that.

13 Q You are presently associated with a record  
14 company at this time; is that correct?

15 A Yes.

16 Q What record company is that?

17 A Kirshner Records.

18 Q To your knowledge, do you ever recall any time  
19 that a publisher granted a mechanical license without hav-  
20 ing that mechanical license reduced to writing?

21 MR. COHN: Objected to, your Honor.

22 THE COURT: I will allow it. It doesn't help  
23 me very much, Mr. Rich, but let's not prolong this. But  
24 I will allow the question.

25 A I can't recall, no.



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Moelis-cross

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2 Q Do you know whether or not after you wrote that  
3 memorandum, that licenses were issued by January, Arch, and  
4 Sealark to Musicor at less than the two cent statutory  
5 rate?

6 A No, I don't know.

7 Q You described in that memorandum a conversation  
8 you had with Mr. Schroeder. Is it possible that your con-  
9 versation was also at the same time with Mrs. Schroeder?

10 MR. COHN: Is it possible? I suppose anything  
11 in the world is possible.

12 MR. RICH: Please, Mr. Cohn. I am asking the  
13 witness.

14 THE COURT: Objection overruled.

15 A No, I don't recall that. I recall my conver-  
16 sation would be with Mr. Schroeder.

17 Q I'm asking you a different question. You said  
18 you recall your conversation with Mr. Schroeder. I'm  
19 asking whether or not it's possible that the conversation  
20 was also in the presence of Mrs. Schroeder--

21 THE COURT: Sustained.

22 Q Whether it be in person or by telephone?

23 THE COURT: Sustained. The question has been  
24 asked and answered.

25 MR. RICH: Your Honor, he said he recalled a

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2 conversation with Mr. Schroeder. I'm asking if it is pos-  
3 sible that Mrs. Schroeder was present during the conver-  
4 sation.

5 THE COURT: Please. Next question.  
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Moelis-cross

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3 Q Mr. Moelis, is it possible that this letter was  
4 written at or maybe just before the time that Mr. Schroeder  
5 sold his stock in Musicor to Mr. Talmadge?

6 A I don't recall.

7 Q Did you ever see a written agreement containing  
8 the terms under which January, Arch or Sealark licensed  
9 to Musicor at a 1-1/2 cent rate?

10 MR. COHN: He testified that he does not recall  
11 the agreements -- period. This is just a repetition of  
12 the same thing.

13 THE COURT: It is redundant. He does not know  
14 whether there is a written agreement embodying this.

15 Q Do you know if there is a written agreement?

16 A No.

17 THE COURT: Okay, you may step down.

18 MR. RICH: Excuse me one second.

19 THE COURT: Before this witness leaves -- I do  
20 not know whether he can help us or not but I do not think  
21 it is self-evident how to apply this letter. It says  
22 "Aaron Schroeder" -- and when I say "apply this letter",  
23 I mean if I find that there is an agreement as per the  
24 letter, it is not immediately evident how to apply that.

25 It says: "Aaron Schroeder says he will allow  
a 1-1/2 cent rate on all pre1964 recordings only if

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2 used in albums. All new recordings will be as per producer's  
3 agreement at statutory rates".

4 I have gone through the listings of the licenses  
5 related to this \$17,000 claim -- that is the claim about  
6 the difference of rate, and then there is another 300  
7 or \$400 claim, but the \$17,000 claim on all those licenses,  
8 the ones that I believe are relied on by the defense side,  
9 are all January 28, 1964. So I do not know how -- and maybe  
10 you can help with this, maybe you cannot -- I do not know  
11 how to apply an agreement that reads the way this does,  
12 because maybe it is intended to apply to actual recordings  
13 made before 1964 even though the licenses were executed in  
14 1964 or maybe -- I don't know.

15 Can you help me on that?

16 THE WITNESS: No, I can't.

17 THE COURT: You really can't.

18 MR. COHN: Your Honor, I will say that it says  
19 exactly what it says. This applies to pre-1964 albums only,  
20 and I think we can all agree on it before your Honor, to  
21 give your Honor the exact dates which will tie in with the  
22 albums.

23 THE COURT: You mean the dates of recordings as  
24 distinct from the dates of licenses?

25 MR. COHN: Yes.



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Moelis

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2 THE COURT: Because all these licenses were  
3 January 28, 1964, isn't that so?

4 MR. COHN: Correct, I know that.

5 THE COURT: Are you telling me that in each case  
6 the recordings were before 1964?

7 MR. COHN: Not in each case, but in the cases  
8 that we will indicate to your Honor.

9 THE COURT: All right, then you will have to do  
10 that.

11 Okay, thank you, Mr. Moelis.

12 (Witness excused.)

13 MR. COHN: May I call Mr. Mogell.

14 I V A N M O G E L L, called as a witness by the  
15 defendants having been first duly sworn, testified  
16 as follows:

17 DIRECT EXAMINATION

18 BY MR. COHN:

19 Q Mr. Mogell, your full name is Ivan Mogell?

20 A Yes.

21 Q What is your business?

22 A I am a music publisher.

23 Q You are in the publishing side, is that cor-  
24 rect?

25 A Yes.

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Q Like in this case Mr. Schroeder's companies?

3

A Similar, I guess so.

4

Q What is the name of your publishing company?

5

A Well, there are a few of them but the parent company is under my name.

7

Q The parent company is called Mogell, after you?

8

A Right.

9

Q And how extensive is your business, in general terms?

10

11

A Well, it is throughout the world.

12

Q It is a worldwide music publishing business?

13

A Yes, popular music.

14

Q For popular music?

15

A Yes.

16

Q Popular recording stars?

17

A Yes.

18

Q Mr. Mogell, how long have you been a music publisher?

19

20

A On my own, about 25 years.

21

Q And as such are you familiar with the customs and usages in the industry?

22

23

A Yes, I am.

24

Q Are you familiar with the function in the industry of the Harry Fox office?

25



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2 A Yes.

3 Q Are you familiar with licenses and licensing  
4 practices in the industry?

5 A Yes, I am.

6 Q And have you been for approximately a quarter of  
7 a century?

8 A Yes, I have.

9 Q And have you as a publisher been a party to the  
10 issuance and construction of terms of licenses?

11 A Yes, through the Harry Fox office. I am a  
12 member of that office.

13 Q It was the next question I wanted to ask.  
14 Are you one of those people who has authorized  
15 Harry Fox to act as your agent?

16 A Yes, I have.

17 THE COURT: When you say a member of his office,  
18 you do not work for his agency?

19 THE WITNESS: No. His agency represents my company  
20 as well, I would say, a good many per cent of the publishers  
21 in the market.

22 Q As a matter of fact, the Harry Fox office is  
23 technically owned by publishers, is that correct?

24 A That is right, that is correct.

25 Q It is an agency which is created and owned by

1 mkbr 6

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2 publishers, which acts as an agent, as you have testified,  
3 for approximately 90 per cent of the publishers?

4 A Yes.

5 Q And you have used them?

6 A Yes.

7 Q In the course of your dealings as a music publisher  
8 over the past 25 years, Mr. Mogell, have you treated  
9 licenses -- on what basis have you treated licenses with  
10 those who record pursuant to licenses which you issue on  
11 a manufactured basis or a manufactured and sold basis?

12 MR. RICH: Objection.

13 A On a manufactured --

14 MR. RICH: Excuse me, objection. I do not think  
15 that Mr. Mogell can answer that. The question is what  
16 the licenses are under the particular situation.

17 THE COURT: I will allow it for what it is worth.  
18 I do not know that it is worth much.

19 Nothing personal!

20 All right, go ahead.

21 A Will you rephrase that?

22 MR. COHN: Could you read the question back,  
23 please?

24 (Question read.)

25 A On a manufactured and sold basis.



1 mkbr 7 Mogell-direct

2 Q Without exception?

3 A Yes, without exception.

4 Q And is it your testimony -- I will ask you, is that  
5 the custom and usage in the industry?

6 A Yes, it is.

7 Q Now when Harry Fox audits in your behalf, do you  
8 know how Harry Fox treats all of the licenses which he has  
9 audited in your behalf?

10 A I would think --

11 MR. RICH: Objection. Obviously he is guessing.  
12 He is saying he "thinks".

13 THE COURT: I don't know how he could possibly  
14 know it.

15 Q Does Harry Fox represent you?

16 A Yes.

17 Q Does he submit to you periodic audited reports?

18 A Yes.

19 Q Do you read them?

20 A Yes.

21 Q Do those reports contain references to reserves  
22 in each instance?

23 A Yes, they do.

24 Q Is it possible to have a reserve if the audit is con-  
25 ducted --

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2 THE COURT: We have been through this with  
3 Mr. Berman -- Mr. Berman told me.

4 MR. COHN: Your Honor, I think I would like  
5 to show you in about three or four questions -- you know  
6 I am not very long -- what is the custom and usage univer-  
7 sally and without exception in this industry.

8 MR. RICH: Your Honor, I will object to  
9 this whole line of questioning.

10

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THE COURT: I will hear the custom. I think I know the custom but if it is going to be gone over quickly, okay.

MR. COHN: Sure.

BY MR. COHN:

Q In each one of the Harry Fox orders has there been references to reserves?

A Yes--not in every one but the ones I recall.

Q Can there be a consideration of reserves if the audit is done on a manufactured basis?

A No.

MR. COHN: Excuse me just one minute.

THE COURT: Okay.

MR. COHN: Nothing further, your Honor.

CROSS EXAMINATION

BY MR. RICH:

Q Mr. Mogell, you as a publisher know that under the copyright law the publisher does not have to give a license to a record company, isn't that correct?

A I--well, the way I know it, I don't believe the first record--I mean I have to on the first record, but if a record comes out anybody could record the song and come out with it the next day under the statutory rate.

Q Is it your understanding that a publisher must

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2 grant a license to a record company that comes out with  
3 your song?

4 A Yes.

5 THE COURT: For what kind of song?

6 MR. RICH: If they record one of Mr. Mogell's  
7 publishing company's songs.

8 Q Are you saying that your company must issue a  
9 license to the record company which records one of your  
10 company's songs?

11 A Through the Harry Fox office, yes.

12 Q In other words, this is obligatory on you to  
13 issue a license, you cannot refuse to issue a license, is  
14 that what you are saying?

15 A The first time--for instance, if I have a brand  
16 new song and someone is aware of the song, I do not have  
17 to issue a license if I do not want to.

18 Q Are you saying that you must issue a license  
19 after the first record comes out?

20 A Yes, if it is under the terms, under the statu-  
21 tory terms.

22 Q And you have been a publisher for 25 years or  
23 thereabouts?

24 MR. COHN: I think we have had it three times.

25 MR. RICH: Excuse me, Mr. Cohn.



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2 THE COURT: Let me ask you this: Suppose you  
3 are just publishing a song, sheet music; are you saying  
4 that you do not have to license anybody to record that  
5 song?

6 THE WITNESS: I have never printed a song unless  
7 I had a record.

8 THE COURT: Okay. I thought that is what you  
9 were telling me.

10 THE WITNESS: In other words, let us say I have  
11 a brand new song. A song was given to me and a company was  
12 interested in the song. If they are aware of it, if I  
13 want to give them a license I can refuse a license if I  
14 want to.

15 THE COURT: I got that--in other words, if you  
16 can refuse a license you do not have to have it recorded?

17 THE WITNESS: That is right.

18 THE COURT: So your understanding is you can't  
19 publish it and you just do not have to issue anybody a  
20 license to record it; right?

21 THE WITNESS: Yes, I haven't. That has been  
22 my experience.

23 THE COURT: Okay, but that is your understand-  
24 ing.

25 THE WITNESS: Yes.

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1  
2 THE COURT: But once you have licensed one  
3 person to record and they have issued a record, then other  
4 people are entitled to the compulsory license?

5 THE WITNESS: That is right.

6 THE COURT: Okay.

7 BY MR. RICH:

8 Q Maybe there is some confusion on this, Mr.  
9 Mogell. You are talking about a compulsory license as  
10 distinguished from a license that you as a publisher would  
11 issue to the record company.

12 Is there such a distinction in your mind?

13 A Well, yes, it is, as I explained to the Judge,  
14 that if I have a song and I do not want to give it out,  
15 and it hasn't been recorded, I don't have to give a license.  
16 I can just hold back the song.

17 Q Isn't it a fact that once a song has been  
18 recorded the publisher is not obligated to give a license  
19 to another record company that comes out with the same  
20 recording?

21 A No.

22 Q Are you familiar with a filing of the notice  
23 of use?

24 A Yes.

25 Q What is a notice of use?



mkjp

Mogell-cross

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1  
2 THE COURT: What does this have to do with his  
3 direct?

4 MR. RICH: It has to do with his credibility as  
5 a publisher. It is not so, what he is saying. I'm trying  
6 to bring this out. I'm going to his knowledge as a music  
7 publisher in the business. This man has taken the stand as  
8 an expert, and I have a right to show that he is not an  
9 expert.

10 [ THE COURT: The problem with Mr. Cohn calling  
11 this witness is that it envisaged cross. I will say to  
12 you that what this witness told me I knew already, and  
13 that is that you do not talk about reserves in a Harry Fox  
14 audit, unless you are dealing with manufactured and sold.

15 Furthermore, Mr. Berman testified that the  
16 usual licensing provisions are based--are for royalties  
17 based upon records manufactured and sold.

18 On the other hand, I am dealing here with the  
19 question whether that usual practice was varied from, to  
20 put it inartfully, by particular contracts. So neither this  
21 witness nor Mr. Berman has told me that it is impossible  
22 for people to provide what they want to provide in their  
23 contracts.)

24 Now can't we leave it at that?

25 MR. RICH: Yes, your Honor. I just want to

1 mkjp

Mogell-cross

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2 bring out a very simple point.

3 Q Isn't it a fact that a publisher does not have  
4 to issue a license to a record company after a song has  
5 already been recorded by another record company, and then  
6 if the second record company wants to record the song and  
7 the publisher will not grant them a license, that the second  
8 record company will then file what is called a notice of  
9 use? Isn't that correct?

10 A I insist on the license.

11 Q I'm not asking you what you insist on.

12 A Well, I'm only going by what I insist.

13 Q Please, Mr. Mogell. Isn't it a fact that the  
14 second record company that comes out with a song that is  
15 recorded by the first, that it must then file a notice of  
16 use or request a license from the publisher of the song?  
17 Isn't that correct?

18 A That is right.

19 Q And if it files a notice of use and does not  
20 obtain a license from the record company, then the second  
21 record company will come in under a statutory provision of  
22 Title 17 of the Copyright Law, isn't that correct?

23 A That is correct.

24 Q And in that event if he has not received an  
25 actual license, that he will have to pay, pursuant to the



mkjp

Mogell-cross

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statute, isn't that right?

A Yes.

Q And the statute provides that it be paid on the basis of records manufactured?

A Yes.

Q Not on records manufactured and sold?

A No, manufactured and sold.

Q That is your understanding of the statute?

A Yes.

Q Now you say that the Harry Fox Agency has given you audit reports?

A Yes.

Q Isn't it a policy of the Harry Fox Agency not to give copies of the audit reports to the publisher?

A No, I did not say that they send me the actual audit that they have done. They send me the results of the audit they have done, which I am concerned about.

Q In other words, if they settle with a particular record company they tell you what it is that your publishing company is entitled to?

A That is right.

Q And they don't give you any breakdown, isn't that correct?

A I don't recall.

mkjp

Mogell-cross

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1           Q       Right. Isn't it a fact that they do not give  
2                   you a statement as to how they arrived at that figure;  
3                   they just send you a check and say they conducted an audit  
4                   and send you a check?  
5

6           A       No. Sometimes they send me a statement where  
7                   they collected X amount of dollars and proportionately this  
8                   belongs to me.

9           THE COURT: And they tell you the basis and they  
10                   tell you that it related to reserves or this and that?

11           THE WITNESS: I don't remember.

12           MR. RICH: I have no further questions.

13           REDIRECT EXAMINATION

14           BY MR. COHN:

15           Q       You do recall that reserves have been dealt  
16                   with in various reports that you have received?

17           A       Yes.

18           MR. COHN: That is all.

19           THE COURT: Thank you very much.

20           Now that calls upon you--

21           MR. RICH: Your Honor, the witness just said  
22                   something to the contrary before the question just put,  
23                   that he did not recall.

24           MR. COHN: Can he argue that in summation?

25           THE COURT: You are excused, Mr. Mogell. Thank

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1 mkjp

Mogell

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2 you very much.

3 (Witness excused.)

4 THE COURT: Now, as I understand it, the main  
5 order of business now is to have Mr. Schroeder testify.

6 MR. RICH: Yes, your Honor.

7 THE COURT: And/or Mrs. Schroeder, so why don't  
8 we proceed.

9 MR. RICH: Yes, and also Mr. Straus.

10 THE COURT: Well let us go with the Schroeders.

11 MR. RICH: Your Honor, there are a few things.  
12 I requested from Mrs. March the original pre-trial order in  
13 this case. I would like to have that marked as a Court's  
14 Exhibit.

15 THE COURT: What does that have to do with the  
16 Schroeders' testimony?

17 MR. RICH: Well, your Honor, I feel I might as  
18 well get at it now before we get on to other things.

19 THE COURT: We have a lot of loose ends.

20 MR. RICH: I tried that at the last session and  
21 I couldn't get it in. I would like to have it marked in  
22 evidence. It goes to various points raised so far, and I  
23 would like to have it marked.

24 THE COURT: We have a lot of loose ends to be  
25 taken care of--

1 mkjp

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2 MR. RICH: Your Honor, this is one of them. I  
3 would like to have that marked in evidence.

4 THE COURT: Okay. Here is the original pre-  
5 trial order of August 9, 1972--hand it to Mr. Rich.

6 (Handing.)

7 MR. RICH: Your Honor, I would like to offer  
8 this in evidence as either a Plaintiffs' Exhibit or as a  
9 Court Exhibit.

10 MR. COHN: Is that the pre-trial order? What  
11 is your usual policy?

12 THE COURT: Mark it as a Plaintiffs' Exhibit  
13 for identification.

14 MR. COHN: Is that your usual policy, to take  
15 a pre-trial order in evidence?

16 THE COURT: It is all right.

17 MR. COHN: I couldn't care less.

18 THE COURT: It is received on the express under-  
19 standing that to the extent that anything in that order is  
20 contrary to the ultimate pre-trial order and stipulation  
21 of June 5th, and the June 5th stipulation supercedes that  
22 order, so that there will be no confusion about that.

23 Plaintiffs' Exhibit 17 is received under those  
24 conditions.

25 (Plaintiffs' Exhibit 17 received in evidence.)

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1 mkjp

2 THE COURT: Okay. Are you ready to call your  
3 witness?

4 MR. RICH: Yes, your Honor. I would like to  
5 introduce or offer--

6 THE COURT: All right, have it marked for iden-  
7 tification.

8 MR. RICH: This is a pre-trial memorandum of  
9 the defendants.

10 (Plaintiffs' Exhibit 18 marked for identifica-  
11 tion.)

12 THE COURT: Are you offering that now?

13 MR. RICH: Yes, your Honor.

14 THE COURT: Is it the defendants' memo or what?

15 MR. RICH: Yes, it is. It is the defendants'  
16 pre-trial memorandum.

17 MR. COHN: Your Honor, do we receive into evi-  
18 dence memoranda of law? I mean, this is going to set a--

19 THE COURT: What are you referring to, Mr.  
20 Rich?

21 MR. RICH: There is an admission in there the  
22 plaintiffs and the defendants both entered into the licenses  
23 which are the subject of this action.

24 THE COURT: All right. What are you particularly  
25 talking about?

1 mkjp

2 MR. RICH: Can I see that for a moment, your  
3 Honor? I can read it right in.

4 (The Court hands to Mr. Rich.)

5 MR. RICH: It says:

6 "This action concerns one hundred and twenty  
7 (120) musical compositions in which plaintiffs allege owner-  
8 ship of all right, title and interest, including copyrights.  
9 (A full list of such compositions, together with the dates  
10 of the respective license agreements, copyright certificate  
11 numbers and dates on which the respective copyrights were  
12 obtained, is included in plaintiffs' pre-trial memorandum,  
13 pages 3 through 7.)

14 "The parties do not dispute that the aforemen-  
15 tioned mechanical license agreements were entered into by  
16 the parties."

17 MR. COHN: Now, your Honor, I object to the  
18 receipt of this for two reasons:

19 First of all, this was prepared apparently a  
20 number of years before--certainly before a year and a half  
21 ago when we came into this case and reviewed it. We do  
22 not adopt--

23 Do you have a date on which you say this was  
24 filed? I see it is the Beldock firm, so I know it is some-  
25 time before a couple of years ago.



1 mkjp

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2 Do you know how many years ago, Mr. Rich?

3 MR. RICH: I believe that was in about the  
4 middle of 1971.

5 MR. COHN: All right. Your Honor, this is  
6 something that was filed some four years ago. We have  
7 been in this case about a year and a half.

8 Since that time, and since we have made an  
9 investigation, and since we have had the advantage of help-  
10 ful pre-trials under your Honor's aegis, I think that  
11 situation has substantially changed.

12 I took the liberty, after our last hearing, of  
13 forwarding to your Honor an April letter which we have  
14 sent to you with a copy to Mr. Rich, in which we had en-  
15 closed a copy of one of United Artists licenses, and  
16 asserted our contention that every recording covered by  
17 the action in this case was originally licensed by Mr.  
18 Schroeder and his interest to United Artists as a distribu-  
19 tor and Musicor as manufacturer under a Musicor label.

20 THE COURT: What I am going to do is this, I'm  
21 going to receive it into evidence, any admissions of this  
22 kind, and I at the same time will have to determine what  
23 weight to give them.

24 I have not been asked to treat them as binding  
25 or as precluding your present arguments, Mr. Cohn, and

1 mkjp

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2 435

3 therefore I won't treat them as a binding admission pre-  
4 cluding your argument.

5 Obviously, if an attorney back in 1972 made  
6 an admission which turns out to have been made before  
7 everything was known, that reduces the weight of that  
8 admission, but that is really the issue here, so I will  
9 receive it. I think it is admissible on the basis that I  
10 have stated.

11 Now I have the original and the original bears  
12 a filing date, so I think that will help us. So let us  
13 have the original marked, please, as Plaintiffs' Exhibit 18.

14 (Plaintiffs' Exhibit 18 received in evidence.)

15 MR. COHN: I would also make the point that I  
16 do not think a pre-trial memorandum of law prepared by a  
17 counsel constitutes an admission of a party that is receiv-  
18 able in evidence.

19 THE COURT: All right.

20 MR. RICH: Your Honor, there was reference in  
21 that pre-trial memorandum to the plaintiffs' pre-trial  
22 memorandum, pages 3 through 7.

23 Your Honor may have that there, too. That is  
24 the one that was served on June 18, 1971.

25 MR. COHN: Your Honor, would it be possible to  
have the witness testify and then if we have some of his



1 mkjp

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2 documentation to do it at some other time?

3 THE COURT: Well, I would rather have that done  
4 now. I think we have just one more thing to do, isn't  
5 that right, Mr. Rich?

6 MR. RICH: That is correct, your Honor.

7 THE COURT: What is the date of this final  
8 document.

9 MR. RICH: It was served, your Honor, on June  
10 18, 1971, and it is called plaintiffs' pre-trial memoran-  
11 dum.

12 THE COURT: Let me see that, please.

13 (Mr. Rich hands to the Court.)

14 THE COURT: (After examining) Okay, let us  
15 have the original marked, too--I will receive that.

16 MR. COHN: The same objection.

17 THE COURT: The same objection. I will over-  
18 rule the objection.

19 (Plaintiffs' Exhibit 19 received in evidence.)

20 THE COURT: Now, can we go to a witness?

21 MR. RICH: Your Honor, I call as my next wit-  
22 ness Aaron Schroeder.

23 A A R O N S C H R O E D E R, called by the plain-  
24 tiffs, sworn.  
25

1 mkjp

Mr. Schroeder-direct

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2 DIRECT EXAMINATION

3 BY MR. RICH:

4 Q Mr. Schroeder, are you associated with the  
5 plaintiff companies, January, Arch and Sealark?

6 A Yes.

7 Q Are you an officer of those companies?

8 A Yes.

9 Q What office do you hold?

10 A President.

11 Q Can you tell me when you became associated  
12 with those companies?

13 A In 1960.

14 THE COURT: I am three feet from you and I  
15 cannot hear you.

16 THE WITNESS: In 1960.

17 Q Mr. Schroeder, have you been an active publisher  
18 since that time?

19 A Yes, sir.

20 Q Are you also a writer and a producer?

21 A Yes, I am.

22 Q In the record and music field?

23 A Yes.

24 Q Could you tell the Court what your duties and  
25 responsibilities have been with these companies?



1 mkjp

Mr. Schroeder-direct

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2 A I have always been involved in the creative  
3 areas, and my wife, Abby Schroeder, has always been con-  
4 cerned with the administrative duties of the business.

5 My work in the business is to evaluate the  
6 music of new writers, help direct their careers, write songs,  
7 produce records.

8 I have never been concerned with any of the  
9 administrative duties of the business, music publishing or  
10 of records.

11 Q When you refer to administrative duties, are  
12 you referring to the licensing of a composition, the  
13 royalties that are payable to a writer or receipts from a  
14 record company--is that the sort of thing that Mrs. Schroeder  
15 is involved in?

16 A Yes. I never got into those.

17 Q And has that been the division of responsibilities  
18 back, say, to 1962 and forward until this date?

19 A Yes.

20 Q Since 1962 who at the publishing companies would  
21 want to make a decision as to whether or not to grant a  
22 request by a record company to license one of January, Arch  
23 or Sealark compositions?

24 A I'm sorry, Mr. Rich, would you repeat that?  
25 I did not hear the question.

mkjp

Mr. Schroeder-direct

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Q I am sorry. Who at the plaintiff companies, January, Arch and Sealark, would have been the responsible persons since 1962 to license their musical compositions?

A Mr. Schroeder.

Q To your knowledge, Mr. Schroeder, have you ever authorized the issuance of licenses going back to, let us say, 1960?

A No, sir, this was never my domain.

MR. COHN: I'm sorry, I did not hear that.

(Answer read.)



1 elbr 1

Mr. Schroeder-direct

502a

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t4 am 2 Q Mr. Schroeder, you were not present on the first  
3 day of this trial last week, and Mr. Talmadge had taken the  
4 stand and testified to certain conversations that he alleged  
5 that he had with you, and I am going to read you from the  
6 transcript and ask you whether or not you had these conver-  
7 sations with Mr. Talmadge.

8 Just to preface that, Mr. Talmadge had testified  
9 that he had received a batch of licenses, had somebody return  
10 the licenses to a party, and then he received the licenses  
11 again bearing Mr. Talmadge's signature.

12 THE COURT: What page are you reading from?

13 MR. RICH: Page 295, your Honor.

14 THE COURT: All right.

15 Q "Q When you received these licenses back  
16 two or three weeks later with the signature purporting to  
17 be yours, what did you do ?

18 "A I called up Mr. Schroeder.

19 "Q Tell us what you said to Mr. Schroeder and what he  
20 said to you, as best you can recall?

21 "A I was very upset about these licenses  
22 coming back to me with a signature which was not mine and  
23 I called up Mr. Schroeder and said look, what the hell is  
24 going on here. I have received these licenses with a  
25 signature that is not mine" --

1 elbr 2

Mr.Schroeder-direct

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2 THE COURT: That is absolutely no reason to read the  
3 record of a previous day.

4 You can ask this witness questions about whether  
5 he had any conversations with Mr. Schroeder -- Mr. Talmadge.  
6 You don't have to read the record.

7 MR. RICH: All right.

8 Q Mr. Schroeder, maybe we could simplify this,  
9 did you ever have any conversations whatsoever with  
10 Mr. Talmadge back in 1974 or 1965 concerning the licenses  
11 issued by January, Arch and Sealark to Musicor?

12 A It is conceivable, but I can't recall any, and  
13 certainly if there were any, they wouldn't have been held  
14 solely by me, but this was again Mrs. Schroeder's area  
15 of the business. I never made any decisions having to do  
16 with licensing or any of that.

17 Q Mr. Schroeder, did Mr. Talmadge ever tell you in  
18 1964, 1965 or any time after that, that he received back  
19 licenses issued on behalf of January, Arch and Sealark  
20 bearing a signature that was not his?

21 A No, I don't remember that at all.

22 Q Did you ever have a conversation with Mr.  
23 Talmadge in 1974, 1965 or thereafter when Mr. Talmadge told  
24 you that he or Musicor was operating from and using  
25 licenses from United Artists and therefore didn't see why he



1 elbr 3 Mr. Schroeder-direct  
2 had to use the licenses from January, Arch and Sealark to  
3 Musicor?

4 A No.

5 Q Did Mr. Talmadge ever discuss with you or did he  
6 ever request from you a license that pre 1974 Gene Pitney  
7 recordings which were distributed by UA should be licensed  
8 by January, Arch and Sealark at the rate of a penny and a  
9 half?

10 A Absolutely not.

11 Q Did you ever agree with Mr. Talmadge that record-  
12 ings contained in albums issued by United Artists and  
13 previously distributed by United Artists would have a  
14 one and a half cent rate for recording done either prior to  
15 May 8, '64 or prior to 1964?

16 A No, sir.

17 Q Did you ever tell Mr. Talmadge that licenses that  
18 were sent on behalf of January, Arch and Sealark were clerical  
19 errors?

20 A No.

21 Q Did you ever tell him that those licenses had no  
22 bearing on the United Artist license?

23 A Never, no.

24 Q Did you ever tell Mr. Talmadge that he should  
25 disregard the licenses sent by Harry Fox on behalf of

1 elbr 4 Mr. Schroeder-direct

2 January, Arch and Sealark to Musicor?

3 A No, sir.

4 Q Did you ever discuss with him the dates contained  
5 on licenses sent by Harry Fox on behalf of January, Arch and  
6 Sealark?

7 A No, sir.

8 Q Mr. Schroeder, Mr. Moelis appeared in court this  
9 morning and testified with regard to a letter that he had  
10 written to Musicor which had been marked in evidence.  
11 Mr. Schroeder, do you recall having a conversation with Mr.  
12 Moelis about a one and a half cent rate on all pre 1964  
13 recordings, if used in albums?

14 A No, I do not recall that conversation at all.  
15 And if it were held, if it is possible that it were,  
16 certainly Mrs. Schroeder would have been there because I  
17 don't discuss these areas --

18 MR. COHN: Excuse me, your Honor. I move to  
19 strike from the records "if it were at all" --

20 THE COURT: I will deny that motion. The answer  
21 stands.

22 Go ahead.

23 Q Mr. Schroeder, to your knowledge did Musicor or any  
24 of its representatives ever advise you or January, Arch and  
25 Sealark before this trial that the licenses issued by



1 elbr 5

Mr.Schroeder-direct

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2 Fox to Musicor were incorrect in any way?

3 A No, sir.

4 Q To your knowledge, did Musicor or any of its  
5 representatives ever advise you or the plaintiffs prior to  
6 this trial that although some of the licenses provided for  
7 a two cent royalty, that the licenses were actually a  
8 penny and a half?

9 A No.

10 Q Did Musicor or any of its representatives ever  
11 advise you or the plaintiffs prior to this trial that  
12 although the licenses were issued on the basis of royalties  
13 to be paid on records manufactured, that the licenses  
14 should properly have provided for the payment of royalties  
15 on the basis of records manufactured and sold?

16 A No --

17 MR.COHN: Just a second.

18 When I get up, it means I might be making an  
19 objection to the Court, so you don't answer. Did that say  
20 advise you or any representative of plaintiff?

21 MR. RICH: That is right.

22 MR.COHN: No objection.

23 Q To your knowledge, did Musicor or any of its  
24 representatives ever advise you or the plaintiffs prior  
25 to this trial that Musicor did not execute the licenses which

1 elbr 6

Mr. Schroeder-direct

445

2 were issued by Harry Fox on behalf of January, Arch and  
3 Sealark and which have been marked in evidence, and I believe  
4 that you have seen them before today.

5 THE COURT: 1, 2, 3 and 4.

6 Q Exhibits 1, 2, 3 and 4?

7 A No.

8 THE COURT: If Mrs. Schroeder was the business  
9 end of this, can't we go ahead with her?

10 MR. RICH: No further questions.

11 THE COURT: And could I ask that in the interests  
12 of efficiency, we can defer the cross examination of Aaron  
13 Schroeder and let us get Mrs. Schroeder on the stand and see  
14 what she had to say, and maybe we will get a better idea,  
15 better side of the case. Can we do that?

16 I'd like to defer cross of Aaron Schroeder.

17 MR. COHN: Sure. Anything you want.

18 As long as you let me eat lunch.

19 THE COURT: Why don't you step down.

20 (Witness steps down.)

21 THE COURT: Mrs. Schroeder, would you take the  
22 stand.



1 elbr 7

Mrs. Schroeder

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2 A B B Y S C H R O E D E R, called as a witness by  
3 the plaintiffs, having been first duly sworn,  
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. RICH:

7 Q Mrs. Schroeder, are you associated with the  
8 plaintiffs' companies, January, Arch and Sealark?

9 A Yes, I am.

10 Q Are you an officer of those companies?

11 A Yes, I am.

12 Q What office do you hold?

13 A Vice president.

14 Q How long have you held that office?

15 A Since 1962 or '3.

16 Q Is that when you became associated with those  
17 companies?

18 A No, I became associated in 1961.

19 Q Would you tell the Court your duties and  
20 responsibilities with these companies?

21 A I handle the administrative responsibilities, domes-  
22 tically and internationally, I summarize all the licensing,  
23 all the accounting functions, both receivable and payable,  
24 I mostly sign the checks, I negotiate licenses with record  
25 companies. I do all the business functions of the business

1 elbr 8

Mrs. Schroeder

2 or supervise them, I should say.

3 Q And Mr. Schroeder previously testified that his  
4 area of responsibility with the companies are in the  
5 creative part of the business, is that correct?

6 A That is correct.

7 Q Did you and Mr. Schroeder have the same duties  
8 and responsibilities going back to 1962?

9 A Yes, sir.

10 Q Since 1962 until this present time who at the  
11 plaintiff companies would make the decisions as to whether  
12 or not to grant a request by a record company to license one  
13 of plaintiffs' musical compositions?

14 A I would.

15 Q To your knowledge, has anyone at the plaintiffs be-  
16 sides you since 1962 ever issued or authorized the  
17 issuance of a license at less -- let me say issued and  
18 authorized the issuance of a license?

19 A No one would ever do that but me.

20 Q There came a time, did there not, when January,  
21 Arch and Sealark utilized the services of Harry Fox?

22 A Yes.

23 Q And it utilized their services at least in 1964,  
24 the latter part of '64, some time in '64, and thereafter?

25 A Absolutely.



1 elbr 9

Mrs. Schroeder

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2 Q You have examined, am I correct, Exhibits 1, 2,  
3 3 and 4; those are the licenses that were issued from  
4 Harry Fox to Musicor?

5 A Yes, I have.

6 Q Are those true copies of licenses received by the  
7 plaintiff companies from the Harry Fox agency?

8 A Yes, they are.

9 Q Did you receive or did the plaintiff companies  
10 receive those licenses from Harry Fox with the same con-  
11 tents as they are here in court, in other words, with the  
12 same names and provisions --

13 THE COURT: She has already said these are the  
14 licenses. How could they have different contents?

15 Q Did you ever or did the plaintiffs' companies  
16 ever receive any unsigned licenses issued to Musicor?

17 A No, sir.

18 Q Did you ever have any discussions with Mr. Arthur  
19 Talmadge or anyone else at Musicor before the licenses which are  
20 involved in this case were issued by Fox to Musicor?

21 A Yes.

22 Q Could you tell us with whom you had these dis-  
23 cussions, when, and what was said?

24 A There were telephone conversations between Mr.  
25 Talmadge and myself. I can go back to June of 1964 when

*Signed May 18, 1964*

1 elbr 10

Mrs. Schroeder

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2 the sale agreement between Mr. Schroeder and Mr. Talmadge  
3 had not yet been signed, although dated earlier.

4 Mr. Talmadge spoke with me about the possibility of our  
5 granting rights to Musicor once he had the company, on old  
6 product that he might repackage.

7 And I told him that it was against our general  
8 policy, however, in the spirit of cooperation we would  
9 certainly take each one as it comes and try to work this  
10 out with him. Then I asked him to please let me know the  
11 effective date when United Artists would cease to distribute  
12 and manufacture the records and when Musicor would take up  
13 the distribution and manufacture on its own, and he said  
14 he would let me know. I waited several months. It was  
15 into the fall of 1964 and I called a few times, and  
16 Mr. Talmadge advised me that it wasn't finalized with United  
17 Artists, he didn't have the date. And I didn't get the date  
18 until December of 1964, and I am not quite sure if it was  
19 from Mr. Talmadge himself or someone at Musicor or even  
20 United Artists, I may have called United Artists, and as soon  
21 as I had that date of the changeover of distribution and  
22 manufacture, I instructed Harry Fox to issue licenses to  
23 the Musicor Company for a list of recordings which we supplied  
24 to Fox.

25 And I instructed the Fox Agency at that time to,



1 elbr 11

Mrs. Schroeder

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2 while they were dating the licenses in the current month  
3 of December, to certainly make them retroactive to the date  
4 of distribution by Musicor, which is a normal thing to do  
5 in the business.

6 I also instructed Al Berman of -- I gave these  
7 instructions directly to Mr. Berman -- I told him that the  
8 licenses were to be issued for each use and not by compo-  
9 sition, but by record number so that there would be no  
10 cross collateralization. I also instructed him to issue  
11 those licenses on the basis of records manufactured.

12 Q Before you had this conversation with Mr. Berman,  
13 as you just testified, did you have conversations with anyone  
14 at Musicor with regard to the royalty rate, in other words,  
15 the issuing of licenses at less than two cents?

16 A Yes, I did. Again, I spoke with Mr. Talmadge several  
17 times between the summer and the fall of 1964, and in one of the  
18 conversations he told me that they were putting out, whether  
19 it was one page or two, I can't tell you the number of  
20 pages, but he gave me various titles on which he requested  
21 a lower rate pursuant to our earlier conversations in June,  
22 and I did in fact grant those rates and put them in writ-  
23 ing in a license as I would always do.

24 Q That was part of your instructions to the  
25 Harry Fox office?

1 elbr 12

Mrs. Schroeder

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2 A Absolutely.

3 Q To grant the lower rate on those particular re-  
4 cordings?

5 A Yes.

6 Q In and among Exhibits 1, 2, 3 and 4, Mrs.  
7 Schroeder, there are licenses that are issued at less than  
8 two cents; for example, Aladdin's Lamp, Brandy is My True  
9 Love's Name, Hello Mary Lou, I Laughed So Hard I Cried,  
10 I Love You More Today, Keep Telling Yourself, Little Betty,  
11 Falling Star, Sure Fire Bet, Today's Teardrops --  
1213 MR. COHN: Your Honor, the titles are delightful.  
14 If we can say there are a certain number of licenses that  
15 provided one and a half cents, not two cents, without reading  
16 it to him --

17 THE COURT: We don't have to read it to him.

18 Q Among others, Mrs. Schroeder, were those the  
19 royalty rates that you agreed to with Mr. Talmadge and then  
20 instructed Mr. Berman or someone at Harry Fox to incorporate  
21 in the license agreements?

22 A Yes, sir.

23 THE COURT: We will break for lunch.

24 (Luncheon recess.)  
25



AFTERNOON SESSION

2:15 p.m.

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5 A B B Y S C H R O E D E R, resumed.

6 MR. RICH: Off the record.

7 (Discussion off the record.)

8 DIRECT EXAMINATION (Continued)

9 BY MR. RICH:

10 Q After these discussions that you had with the  
11 Harry Fox Agency, Mrs. Schroeder, did Harry Fox send out  
12 licenses to Musicor in December of 1964?

13 A Yes, they did.

14 Q And are those the ones that are dated December  
15 1964?

16 A Yes.

17 Q And do you know that through conversations that  
18 you had with anybody at the Fox Agency?

19 A They send us a confirmation copy in blank to notify  
20 us -- that is our notification that the licenses have gone  
21 out. They send us a last copy.

22 In other words, that we dispose of when the signed  
23 agreements come in.

24 Q After the licenses were sent by the Harry Fox  
25 Agency, Mrs. Schroeder, to Musicor --

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Mrs. Schroeder

THE COURT: Wait a minute. You are saying that when they send the proposed licenses to the licensee for signature they send you a last or blank copy for your information; right?

THE WITNESS: It merely says "confirmation".

THE COURT: Okay.

Then after the licenses are fully executed do you receive copies?

THE WITNESS: Oh, yes.

THE COURT: And did you receive copies of the licenses that were involved within this action?

THE WITNESS: Absolutely.

THE COURT: Okay. You received signed copies?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead, Mr. Rich.

Q Mrs. Schroeder, after Harry Fox sent out these licenses in December of 1964 did you have a conversation with Arthur Talmadge?

A Yes. I recall that Mr. Talmadge did call me and he said that he had received a large number of licenses from the Fox office and he wanted to know what they were for, and I told him, pursuant to our several conversations, that once I had the effective date of Musicor establishing its own manufacturing and distribution, these were the



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Mrs. Schroeder

licenses to Musicor, that the United Artists licenses were only valid while United Artists was manufacturing and distributing, they were paying royalties. They had ceased to do that so that they couldn't pay anything, and I would have to have new licenses with the company, Musicor.

MR. COHN: May I have that answer read back?

THE COURT: Yes, let us have the whole answer read.

(Read.)

THE COURT: Okay, Mr. Rich.

Q And what did Mr. Talmadge say?

A As I recall, he asked me about the date of the licenses and I explained to him that while the date was in December it was the usual practice of the Fox Agency and ourselves to date a license back retroactively, either to the release of a record, in the case of one situation, or to the effective date of manufacturing and distribution. I also pointed out to him that we had issued licenses for each use and not on an overall basis of musical compositions.

I believe that was the basis of the conversation.

Q And did Mr. Talmadge respond to you?

A He told me that he understood, in words of that nature.

mkbr

Mrs. Schroeder

455

MR. COHN: I am sorry, I didnot catch that.

(Answer read.)

Q Now, Mrs. Schroeder, after the licenses which are dated December 1964 was sent out, other licenses -- and I think those are parts of Exhibits 1, 2, 3 and 4 -- were also sent out?

A Yes.

THE COURT: You know, if you would look at the group of licenses, there was some in October, there was some in November, there was some in December, and some in 1965 -- in June 1965.

MR. RICH: That is right.

THE COURT: Are you not concerned with anything that happened in October and November?

MR. RICH: Your Honor, I do not want to offer testimony as to when those licenses were sent out -- whether that was part of the December licenses or sent out before.

Q Mrs. Schroeder, the licenses that were sent out, I think -- there are licenses that are dated in October 1964, in addition to the licenses that are dated in December 1964, and of course there are licenses in 1965 --

THE COURT: Put your question.

Q -- various dates in 1965.



1 mkbr

Mrs. Schroeder -direct

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2 THE COURT: How did this come about?

3 MR. RICH: Pardon me, your Honor?

4 THE COURT: How did this come about?

5 MR. RICH: Yes.

6 Q What are the circumstances of those licenses being  
7 sent out?

8 A Without seeing the titles, I would probably  
9 be able to give you specific information, but without seeing  
10 the titles I would think that as licenses are requested  
11 by a record company, we request Harry Fox to send them out,  
12 or the request would go to the Fox Agency and they are  
13 sent out in the normal course.

14 If we know of the release of a record we will send  
15 out a license -- we will instruct Harry Fox to issue a li-  
16 cense.

17 Q And those requests would have been made in  
18 October 1964, the request for that license might have been  
19 made at or about that time or shortly before that time,  
20 is that right?

21 A That or we noticed a release of a record in the  
22 trade papers -- once we see a release and we get the in-  
23 formation from the record company or the record label,  
24 we do not necessarily rely on the record company.

25 Q Did Musicor ever send or return any licenses in

mkb<sup>r</sup>

Mrs. Schroeder-direct

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1964, 1965 and 1966 directly to January, Arch or Sealark?

A Never.

Q Did January, Arch or Sealark ever send licenses to Musicor in that period of time?

A No.

Q Did anyone at January, Arch or Sealark insert the name Art Talmadge on any of the licenses?

A No.

Q I note that some of the licenses contain the name of licensees that are in the packages marked 1, 2, 3 and 4 -- contain the name C. Spinoza and Blanche Wilson, who appear to have signed on behalf of Musicor.

Do you know whether those persons were associated with Musicor in 1964 and 1965?

A Chris Spinoza was, and may still be -- he was, I think, the sales manager or sales promotion, and he signed licenses in October of 1964, as I recall, and Blanche --

THE COURT: Chris?

THE WITNESS: Chris Spinoza.

A (Continuing) Blanche Wilson, I recall, was an employee of Musicor -- I cannot tell you what her position was.

THE COURT: What was that last answer?

(Answer read.)



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Mrs. Schroeder-direct

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Q Mrs. Schroeder, in the publishing industry is it usual for employees of a record company to sign the name of another person on mechanical licenses?

A Absolutely usually, yes.

Q Did you ever receive a license from Harry Fox Agency which was issued to Musicor without the signature of someone signing on behalf of Musicor?

A Never. We would never get back a license unless it was signed. It goes to Harry Fox office.

Q To your knowledge, has January, Arch or Sealark ever granted a record company a mechanical license without reducing the terms of that license to writing?

A Never.

Q To your knowledge after 1962 has Mr. Schroeder ever granted a mechanical license to any company without your consent?

A Definitely not.

THE COURT: Anything else?

MR. RICH: Yes, your Honor.

I would like to have this marked for identification.

(Document marked Plaintiffs' Exhibit 20 for identification.)

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Mrs. Schroeder-direct

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BY MR. RICH:

Q Mrs. Schroeder, I show you a copy of an agreement. It is dated May 8, 1964, between Aaron Schroeder --

THE COURT: Why don't you ask the witness what that is.

MR. RICH: Okay.

Q Mr. Schroeder, I show you a document and I ask you if you know what that is (handing).

A (After examining) This is a production agreement between Musicor and Aaron Schroeder.

Q Mrs. Schroeder, the agreement is dated May 8, 1964. Do you know the date that this agreement was actually made?

A It was June 8th or subsequent thereto.

Q Prior to the date this agreement was signed, was an agreement reached with Mr. Talmadge or Musicor about the rates on songs published by January, Arch, Sealark?

MR. COHN: I do not object to "Did you have a conversation with Mr. Talmadge", but I do object to "Was there an agreement reached."

MR. RICH: All right.

THE COURT: First of all, you have not offered Exhibit 20 yet.

MR. RICH: All right, I offer it in evidence.



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Mrs. Schroeder-direct

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MR. COHN: No objection.

THE COURT: I will receive it.

(Plaintiffs' Exhibit 20 was received in evidence.)

THE COURT: Is Exhibit 20 the agreement providing for Mr. Talmadge to buy out Mr. Schroeder's half interest in Musicor, or was there something else?

THE WITNESS: What I just saw is a production agreement which was released.

THE COURT: Why do we need it? What interest do we have in the production agreement?

MR. RICH: Your Honor, this is the agreement which incorporates a provision that the songs of January, Arch and Sealark will be licensed at a certain rate.

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1 eljp 1

Mrs. Schroeder-direct 461

2 THE COURT: Licensed from whom to whom?

3 MR. RICH: Licensed from January, Arch and  
4 Sealark to Musicor. There is a provision concerning the  
5 licensing of songs.

6 THE COURT: Let's see it.

7 MR. COHN: Of course, we totally disagree with  
8 Mr. Rich's interpretation of the agreement. This is with  
9 relation to subsequent things, not at the time of the  
10 agreement with United Artists.

11 MR. RICH: If there was an agreement about the  
12 payment of royalty at or about the time this agreement was  
13 made, it also would have been incorporated in possibly the  
14 same paragraph, 14.

15 MR. COHN: That is a totally different issue.  
16 Your contention is, as I understand--

17 THE COURT: Just one second.

18 (Pause.)

19 THE COURT: What was the purpose of this pro-  
20 duction agreement? What was it?

21 THE WITNESS: It was part and parcel of the  
22 purchase--

23 THE COURT: What part and parcel was it?

24 THE WITNESS: It was for Mr. Schroeder to con-  
25 tinue to produce Gene Pitney recordings in order to derive



1 eljp 2

Mrs. Schroeder-direct

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2 royalties and other benefits.

3 THE COURT: You mean to actually manufacture  
4 or arrange for the manufacture?

5 THE WITNESS: No. Musicor would do the manu-  
6 facturing and distribution. Mr. Schroeder merely creatively  
7 produced the records with the artist and presented it to  
8 Musicor for distribution and manufacture. Prior to the  
9 manufacture--

10 THE COURT: What was the compensation arrange-  
11 ment for that?

12 THE WITNESS: There is a royalty provision in  
13 that agreement of 2 per cent if it is a single side, or  
14 4 per cent if it is two sides of a single record.

15 There is also a payment for each side of--a  
16 fee when he goes into the recording studio, he receives a  
17 fee for that production.

18 THE COURT: What does this paragraph 14 relate  
19 to?

20 THE WITNESS: This relates to publishing that  
21 Mr. Schroeder might control in the case of January, Sea-  
22 lark and Arch, where he is principal. Then we were making  
23 it explicit that there would be no rates lower than the  
24 statutory 2 per cent rate on that material published by  
25 our firms, so that there would be an understanding before

1 eljp 3

Mrs. Schroeder-direct

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2 signing the agreement.

3 MR. COHN: Your Honor, I move to strike "so  
4 there would be an understanding before signing."

5 THE COURT: I asked her.

6 MR. COHN: Even so, with great deference to your  
7 Honor having asked it, the answer still is not--8 THE COURT: But I have got to understand. What  
9 puzzles me here, I don't know whether this paragraph 14  
10 or this agreement is relating to some other arrangement or  
11 some arrangement relevant to my problem.12 If that is a production agreement, it relates  
13 to, I gather from your testimony, Schroeder's ability to  
14 continue to creatively produce songs of Gene Pitney, right?

15 THE WITNESS: Right.

16 THE COURT: And he would be compensated for that,  
17 right?

18 THE WITNESS: Right.

19 THE COURT: And there would be some percentage  
20 fee or something like that, right?

21 THE WITNESS: Right.

22 THE COURT: In addition, there had to be some  
23 payment from the distributor and manufacturer of the rec-  
24 ords to the owner of the copyright, right?

25 THE WITNESS: Right.



1 eljp 4

Mrs. Schroeder-direct

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2 THE COURT: And you are saying that your under-  
3 standing would be that paragraph 14 related to the latter  
4 feature?

5 THE WITNESS: Yes, absolutely.

6 THE COURT: Okay. All right.

7 Q Mrs. Schroeder, is it normal and usual in the  
8 record publishing industry for agreements concerning the  
9 licensing of musical compositions not to be reduced to  
10 writing?

11 A No, it is not normal at all. There are all re-  
12 duced to writing that I know of.

13 Q There has been prior testimony about the United  
14 Artists licenses. What company issued those licenses?

15 A Our own firms, January, Sealark and Arch.

16 Q Did Harry Fox issue those licenses?

17 A No.

18 THE COURT: She testified he didn't.

19 Q If Musicor was operated under the United  
20 Artists licenses and not the Musicor licenses, Exhibits  
21 1 through 4, would Musicor have discussed payment to Janu-  
22 ary, Arch and Sealark pursuant to the Harry Fox licenses?

23 A Well, they should have--

24 THE COURT: I didn't understand that. Rephrase  
25 it, please.

1 eljp 5

Mrs. Schroeder-direct 465

2 MR. COHN: I didn't understand that either.

3 MR. RICH: I will rephrase it, your Honor.

4 THE COURT: Is your question, if you were still  
5 operating under the old United Artists licenses, would  
6 Harry Fox be auditing the royalties due, is that your  
7 question?

8 MR. RICH: Yes, your Honor.

9 THE WITNESS: They would not.

10 THE COURT: Why wouldn't they? Couldn't you  
11 employ an agency to audit royalties due under licenses that  
12 you had issued directly, even though they had not issued  
13 them?

14 THE WITNESS: No. Harry Fox didn't work in  
15 that way. They issued their licenses and they audit on  
16 their licenses. They wouldn't audit on somebody else's  
17 licenses. They will not take over that agency.

18 THE COURT: Next question.

19 Q Mrs. Schroeder, to your knowledge, did Musicor  
20 or any of its representatives ever advise you or the  
21 plaintiffs prior to this trial that the licenses issued  
22 by Harry Fox to Musicor were incorrect in any way?

23 A Never.

24 THE COURT: We had that so many times, that  
25 doesn't help me at all. Let's go on.



eljp 6

Mrs. Schroeder-direct 466

MR. RICH: Your Honor, I still must ask the questions.

THE COURT: I think you asked that.

MR. RICH: Not to Mrs. Schroeder.

THE COURT: Have there been any complaints?

THE WITNESS: No.

THE COURT: Except the defenses in this lawsuit?

THE WITNESS: No.

Q Did Musicor to your knowledge ever complain that they did not execute the licenses marked Exhibits 1, 2, 3 and 4?

A Never.

THE COURT: Anything else?

Q Is there to your knowledge, Mrs. Schroeder, and being in the publishing industry for quite some time now as you have testified, and by the way, prior to the time that you joined January, Arch and Sealark in 1961 were you also associated with any record companies?

A Yes, four.

Q Is there a practice in the record and publishing industry permitting the record company to cross collateralize--I will ask that question first.

A No. You go according to the license agreement.

eljp 7

Mrs. Schroeder-direct

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Q And is there a practice or custom in the record and publishing industry permitting a record company to report royalties on the basis of records manufactured and sold where the licenses previously provide for the payment of royalties on the basis of records manufactured?

A Certainly not to my knowledge.

Q Did you ever have any discussion with a representative of the Harry Fox Agency concerning their audits of Musicor and payments of Musicor?

A Yes, I did, in early 1965, I guess it was, I believe it was. I spoke to Al Berman and told him that we were already experiencing problems with Musicor on two levels, both Mr. Schroeder's production agreement and also with regard to our own copyrights.

We felt we were not being accounted to properly. There were songs that were on the national charts and we had seen one or two royalty statements that didn't reflect sales anywhere near the number we had anticipated, and we unfortunately were thinking of litigation and, therefore, he was not to issue licenses any more without checking with me first. This is Mr. Berman I spoke with.

Also, if they were intending to conduct any audits, please make sure that we are kept out of it because I was going to have our own accountant do an audit almost



eljp

Mrs. Schroeder-direct

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1 immediately; and if they did happen to do an audit. I said  
2 I would like to have what information your auditors come  
3 up with, but certainly keep us out of any settlement be-  
4 cause we anticipate there will be quite a sum of money due  
5 us.  
6

7 Q By the way as a normal practice with the  
8 Harry Fox Agency, does the Harry Fox Agency give the pub-  
9 lishers copies of their audits of record companies?

10 A Positively not.

11 Q Did you receive copies other than the first  
12 audit, or possibly the first audit, of any of the audits  
13 conducted by the Harry Fox Agency?

14 A I did not receive copies of any of the three  
15 audits.

16 Q Did you have a discussion with Mr. Berman or  
17 anybody else at the Harry Fox Agency as to whether the  
18 Fox Agency settled its audits of Musicor on behalf of the  
19 plaintiffs?

20 A Yes.

21 Q Can you tell us what was said in this conver-  
22 sation that you had? First of all, with whom did you have?  
23 Mr. Berman?

24 A Al Berman. I always spoke with Al Berman with  
25 regard to these matters. He was the only one with authority.

eljp 9

Mrs. Schroeder-direct 469

I asked him if they had conducted the first audit and he told me that they had and that they were kept apart, and when it came to settlement we were excluded. And in the second and third instances of audits conducted by the Fox Agency, I was again assured by Mr. Berman by telephone that we were not included, and I kept in contact with him through the years to make sure that during the litigation there would be no mistake that we were not lumped with the other publishers that he was representing.

(Plaintiffs' Exhibit 1 marked for identification.)

Q Mrs. Schroeder, to your knowledge, was any agreement or understanding reached with Musicor permitting January, Arch and Sealark to retain royalties paid by Musicor without prejudice to their company's rights in this action?

A Yes. There was an agreement between our attorneys, I discussed this first with Mr. Borston and then with yourself and there was an agreement between the two of us and Mr. Talmadge's attorneys that we would in fact retain payments.

THE COURT: Is there any issue about that?  
I haven't heard any.

MR. RICH: Your Honor, I don't know what they



1 eljp 10

Mrs. Schroeder-direct

470

2 may bring up. This had been mentioned once before that per-  
3 haps--

4 THE COURT: I have never heard of an offense  
5 in this action based on that, and I see negative nods  
6 from Mr. Cohn. Drop that point. Go ahead with the next  
7 one.

8 Q Did there come a time, Mrs. Schroeder, when  
9 January, Arch and Sealark requested an audit or requested  
10 someone to audit Musicor in their behalf?

11 I'm not referring to the Harry Fox Agency.

12 A Yes. Early in 1965 we asked our CPA, William  
13 Lazarow, to conduct an audit on the Musicor books.

14 Q Did Mr. Lazarow do so?

15 A Yes, he did.

16 Q Did he issue a report?

17 A Yes, it was early summer of '65 that we received  
18 a report from Mr. Lazarow.

19 (Plaintiffs' Exhibit 22 marked for identifica-  
20 tion.)

21 Q Is that the audit report that Mr. Lazarow gave  
22 to January, Arch and Sealark?

23 , A Yes.

24 MR. RICH: I would like to introduce that in  
25 evidence.

1 eljp 11

Mrs. Schroeder-direct 471

2 MR. COHN: I think I'm going to object to that,  
3 your Honor.

4 THE COURT: What does it have on any of the  
5 issues as framed by the stipulation?

6 MR. RICH: With regard to the termination of  
7 the licenses, your Honor.

8 THE COURT: I sustain the objection.

9 Q After receiving that report, Mrs. Schroeder,  
10 did you instruct your attorney to terminate the licenses  
11 marked as Exhibits 1 through 4?

12 THE COURT: You can have your record. I will  
13 understand that you will attempt to introduce evidence  
14 having to do with the termination of the licenses and I  
15 will on my own initiative exclude that as an issue beyond  
16 the issues framed on the pre-trial order.

17 Do you have anything else on the issues in the  
18 pre-trial order?

19 MR. RICH: One minute please, your Honor.

20 (Pause.)

21 MR. RICH: I just wanted to say for the record  
22 again, your Honor--

23 THE COURT: Please, we have had enough on the  
24 record--

25 MR. RICH: That the framing of the issues on



1 eljp 12

Mrs. Schroeder-direct 472

2 the pre-trial stipulation had to do with the accounting.

3 THE COURT: I don't know what that means, but  
4 that isn't it. Anything else?

5 MR. RICH: No, your Honor.

6 THE COURT: All right. Cross examine.

7 MR. COHN: May I take Mr. Schroeder first, your  
8 Honor?

9 THE COURT: Sure.

10 A A R O N S C H R O E D E R, recalled.

11 CROSS EXAMINATION

12 BY MR. COHN:

13 Q Mr. Schroeder, do you recall this morning that  
14 Mr. Rich referred you to conversations Mr. Talmadge had  
15 testified about when you were not in Court which he fixed  
16 at a period of time when he had received licenses from the  
17 Harry Fox office in your behalf and had telephoned you  
18 objecting to those licenses?

19 Do you recall he asked you about that area and  
20 then you responded saying no such conversation ever took  
21 place?

22 A Yes.

23 Q And no such telephone calls ever took place?

24 A That's correct.

25 Q When you gave that testimony were you aware of

1 eljp

Mr.Schroeder-direct 473

2 the fact that your wife had had conversations with Mr.  
3 Talmadge at that period of time concerning his receipt of  
4 those licenses which he raised issues and objections to  
5 those licenses?

6 A I never really concerned myself with that area  
7 of the business.

8 Q Mr. Schroeder, that is just not an answer. My  
9 question is this: You heard your wife testify just now,  
10 didn't you?

11 A Yes.

12 Q Did you hear your wife testify that around  
13 1964, end of '64, Mr. Talmadge telephoned her and said,  
14 I have a bunch of licenses here and there are things I  
15 don't like about it; first of all, we have United Artists  
16 licenses which govern--

17 THE COURT: Let's not try to repeat the record.  
18 When you testified this morning did you know that your  
19 wife had received a call from Mr. Talmadge making certain  
20 complaints about the licenses received in December, '64?

21 THE WITNESS: Your Honor, my head was so much  
22 into music and studio--

23 THE COURT: Please, just yes or no.

24 THE WITNESS: I don't recall any of those dis-  
25 cussions.



1 eljp

Mr. Schroeder-direct

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2 THE COURT: That is the answer.

3 THE WITNESS: I just never concerned myself  
4 about it.

5 Q In preparing for your testimony today--

6 THE COURT: Mr. Cohn, it doesn't make any dif-  
7 ference.

8 MR. COHN: It doesn't, Judge?

9 THE COURT: Whether he had it in mind. He was  
10 asked about whether he had conversations and he answered.  
11 His wife got on the stand and testified about her conver-  
12 sations.

13 MR. COHN: I thought that was a somewhat criti-  
14 cal issue and apparently they were attempting to say that  
15 Mr. Talmadge was making up this whole thing about the  
16 conversations when he received this batch of licenses.

17 MR. RICH: The testimony was just that--

18 THE COURT: It isn't going to help me. Let's  
19 cut it short.

20 MR. COHN: I'm going to try to cross examine,  
21 if I can. I'm sorry, I lost my train.

22 THE COURT: It doesn't help me if he knew that  
23 his wife had conversations--

24 MR. COHN: It helps me, then, if I hear my  
25 client practically being called a liar when he said he

1 eljp

Mr. Schroeder-direct

2 received a batch of licenses in '64--

3 THE COURT: All right.

4 MR. COHN: Would you give me a minute?

5 (Pause.)

6 Q The fact is, you knew now that Mr. Talmadge  
7 did call up when he received this batch of licenses and  
8 say I don't like them, you heard your wife say that here  
9 in Court, didn't you?

10 A Yes.

11 Q By the way, don't you make it a practice of  
12 being on an extension phone when your wife conducts business  
13 conversations?

14 A No, I don't make it a practice.

15 Q Are there occasions when you are on an extension  
16 phone when your wife is discussing business with various  
17 people?

18 A Only if she requests me and that is not too  
19 often.



1 mkbr 1

Mr. Schroeder-cross

t3/1 pm 2 Q I am not saying whether she requested you or  
3 not, but are there occasions when you are both on the same  
4 end of the telephone at your offices?

5 A Through the years there might have been one or  
6 two times, I don't recall.

7 Q Just one or two times?

8 A Yes.

9 Q Did any of them involve Mr. Talmadge?

10 A I don't recall.

11 Q You don't know one way or the other?

12 A No, I don't recall.

13 Q I believe your testimony this morning was that you  
14 never got into the business end, is that right? You are  
15 creative, an inventor, you don't get into the business end  
16 at all?

17 A No.

18 Q Who negotiated the contract for Mr. Talmadge to  
19 buy out your interest in Musicor?

20 A My attorneys.

21 Q You had nothing to do with it?

22 A They did not discuss it with me.

23 Q Isn't it a fact, Mr. Schroeder, that you bombarded  
24 Mr. Talmadge with a surge of letters demanding payments,  
25 raising questions about terms, and things like that from

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2 1964 on?

3 MR.RICH: Objection. What do you mean by "bom-  
4 barded"?

5 MR. COHN: Maybe that is an inartistic word.

6 Q Isn't it a fact that you have written a number  
7 of business letters to Mr. Talmadge and had business  
8 conversations with Mr. Talmadge concerning business terms?  
9

10 A I don't recall.

11 Q Well, are you prepared to tell us that you did  
12 not?

13 I know you see me holding a piece of paper.

14 A There might have been letters mailed by my  
15 attorneys or by my wife over my signature, but the business  
16 decisions were not mine -- they never were and they aren't  
17 today.

18 Q Regardless of whether there were decisions --  
19 and I will be brief on this -- I understood your testimony  
20 this morning to be that you yourself did not get into these  
21 things at all, your wife signed everything, said everything,  
22 did everything on the business end.

23 I am now asking you whether it isn't a fact that  
24 you did a considerable number of things under your signature  
25 and through your voice.

A I have answered your question, sir.



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MR. COHN: Will you please mark this for identification.

(Defendants' Exhibit NN was marked for identification.)

BY MR. COHN:

Q For example, would you look at Defendants' Exhibit MM for identification and tell us whether or not you recognize the signature on that letter (handing).

A Yes.

Q Is it your signature?

A Yes.

Q Was it written to Mr. Talmadge?

A Yes.

Q Was it mainly discussing from payment terms and saying they were late in paying something or other?

A Yes.

Q Did you write the letter?

A I signed the letter. I doubt very much if I created the letter.

Q Somebody else created it?

A Yes, the terms of the agreement were not looked after by myself.

Q Did you sign the contract, Exhibit --

Did you sign the United Artists contract which

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your lawyer was just referring to just a few minutes ago?

A In all likelihood I did.

Q Were you familiar with the terms when you signed it?

A Generally.

MR. COHN: May I please have the pretrial memorandum -- that is, the defendants' pretrial memorandum which was offered in evidence by the plaintiff this morning?

THE COURT: Here it is -- Exhibit 19 (handing).

MR. COHN: I need the Defendants', your Honor -- I think it is Exhibit 18.

THE COURT: Right (handing).

MR. COHN: Thank you.

BY MR. COHN:

Q You testified this morning, Mr Schroeder, that at no time prior to a certain time were you familiar with or anybody representing you with any assertion by the defendants in this case that your claim in this case did not recognize a penny and a half agreement, which was confirmed by you to the law firm representing Mr Talmadge, a firm called Milius & Asher.

MR. RICH: I do not understand the question.

A Neither do I. I do not understand the question.



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MR. COHN: May I have it read back, please?

(Question read.)

A I do not understand it.

MR. RICH: May I ask a question --

MR. COHN: I think I will even withdraw it.

THE COURT: All right.

Q Isn't it a fact that in 1972 the defendants in this case filed a pretrial memorandum listing Mr. Asher as a witness in this case, following which there was a conversation between your attorneys and Mr. Beldock, then representing the defendants, concerning why Mr. Asher was on the witness list, in the course of which your representatives were told by Mr. Beldock that Mr. Asher was on the witness list to confirm a penny and a half agreement on pre 1964 records? Do you recall that?

A No.

Q Did your attorneys keep you abreast of conversations such as this, with attorneys for the defendants?

MR. RICH: Objection to the reference "such as this." He said he had no conversation.

THE COURT: Please -- overruled.

Q Did your attorneys keep you abreast of conversations such as this, covering the subject matter such as this?

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2 A They might have.

3 Q And they might not have, is that right?

4 A Yes.

5 Q So when you undertook to give those answers  
6 this morning you were not meaning to say that claims and  
7 assertions by the defendants had not been discussed with  
8 your attorneys concerning which you had no knowledge?

9 MR. RICH: I do not understand the question.

10 A I do not understand the question.

11 Q Well, maybe I am being a little inartistic at  
12 this point. I understood the witness to say flatly this  
13 morning the first "we," the plaintiffs or our agents, and  
14 I asked particularly about that -- ever heard about this  
15 penny and a half situation on pre 1964 -- on all pre 1964  
16 recordings -- that this was never mentioned by the defend-  
17 ants, we were never put on notice, we were never told.

18 I have been told by Mr.Beldock --

19 MR. RICH: Objection, your Honor. Mr. Cohn knows  
20 this.

21 MR. COHN: Well, you call Mr. Beldock to come back  
22 and testify.

23 THE COURT: This is really unnecessary.  
24 On that kind of question, frankly, I was thinking of it in  
25 terms of some kind of business notice to him --



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MR. COHN: Okay.

THE COURT: -- and I am sure as things went on in the litigation, I wouldn't assume that he barred any of that.

MR. COHN: All right.

THE COURT: Okay.

Anything else?

MR. COHN: Yes.

Q I assume there is no point in my asking you questions about the Musicor-United Artists contract which Mr. Rich did, which you signed because you would probably refer me to Mrs. Schroeder, is that right?

A I would.

Q By the way, one last thing, did you authorize Mr. Rich to advise Judge Griesa in court -- I know you lost your father and we certainly all reject that but did you authorize Mr. Rich to advise the Court a week ago that you would be unable to attend court and that you were observing the Jewish mourning period -- the shiva period in all respects?

A Yes.

Q As an orthodox Jew?

A Yes.

MR. RICH: Your Honor, I do not see the rele-

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vance.

MR. COHN: It is his credibility, and it will be very brief.

THE COURT: Overruled.

Q Isn't it a fact that during the period of time when Judge Griesa adjourned this case, in deference to that, you entertained at a restaurant, held cookouts in the country?

A Cookouts in the country?

Q Did you entertain at a restaurant last Thursday night called The Bicycle Club?

A Absolutely not.

Q Were you there?

A No, sir.

Q You weren't. Did you have a cookout at your home Friday night -- a cookout?

A No.

Q Where do you live?

A 293 East Palisade Avenue.

Q Where were you Thursday night?

A Probably at home entertaining my sister who was in.

Q You are quite sure you did not go to the -- do you know The Bicycle Club?



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2 A I know of it. I have never been there, definitely.

3 Q You are quite sure you did not have a cookout on  
4 Friday night, you did not come out and cook steaks for any-  
5 body?

6 A Absolutely not.

7 Q You did not.

8 Where were you Friday night?

9 A Where was I Friday night? I think I was home.

10 Q Well, you do not have any doubt about that --  
11 that was a Friday night.12 A I am not completely in control of my memory at  
13 the moment. I am not feeling quite well, and I know that  
14 I did not entertain large groups of people, nor was I at  
15 the Bicycle Club, nor did I go to any of these places you  
16 are talking about.17 Q My pending question is, if you are not feeling  
18 well, you tell his Honor that you do not feel well and I  
19 will stop.

20 A Yes.

21 Q Isn't it a fact that last Friday night you cooked  
22 steaks for a group of people ?23 A Absolutely not. I did not cook for anybody.  
24 I have never cooked for anybody.

25 Q Were you at a cookout held on the lawn of your

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2 home?

3 A A cookout held on the lawn --

4 Q I do not want to fence with you on words --

5 A No, I was not at a cookout held on a lawn.

6 Q I do not want to fence with you but did you have --

7 A That is the word you are using.

8 Q But in substance did you set up a grill on the  
9 lawn?

10 A No, I did not.

11 MR. COHN: I have nothing further.

12 MR. RICH: Nothing further.

13 THE COURT: All right, you may step down.

14 (Witness excused.)

15 THE COURT: Can you cross examine Mrs. Schroeder?

16 MR. COHN: Yes.

17 A B B Y S C H R O E D E R, resumed.

18 CROSS EXAMINATION

19 BY MR. COHN:

20 Q Mrs. Schroeder, there is no question at all in  
21 your mind that Mr. Talmadge, on the receipt of this bunch  
22 of licenses, called you up and said what you testified  
23 about in your direct conversation, is there?

24 A No doubt.

25 Q There is also no doubt in your mind that you



1 mkbr Mrs. Schroeder-cross 486  
2 signed United Artists licenses in behalf of your husband's  
3 interest governing the very recordings involved in this  
4 case, is there?

5 A While they were being distributed and manufactured  
6 by United Artists, of course we would issue licenses to  
7 United Artists.

8 Q My question was not "we would".

9 The fact was you did.

10 A We did.

11 Q Under your signature?

12 A Yes.

13 Q And is it not a fact that every one of those  
14 licenses says "manufactured and sold"?

15 A I can't recall the licenses.

16 THE COURT: I think I have it in the license,  
17 but specifically is it correct that for the recordings in  
18 question in this case there was a prior United Artists  
19 license?

20 THE WITNESS: Yes.

21 THE COURT: For each of those compositions and  
22 on each of the relevant recordings?

23 THE WITNESS: Yes.

24 THE COURT: And the label which this was issued  
25 under was the Musicor label?

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2 THE WITNESS: That is right.

3 THE COURT: And it continued to be under the  
4 Musicor label after the new licenses, right?

5 THE WITNESS: Right.

6 THE COURT: Okay.

7 MR. COHN: And the provisions of those licenses  
8 I think we have in the record, your Honor.

9 THE COURT: Yes, we do.

10 MR. COHN: Is that right, Mr. Rich?

11 Each and every one of them is "manufactured and  
12 sold", not "manufactured"?

13 THE COURT: Yes, that is clear.

14 BY MR. COHN:

15 Q And also, Mrs. Schroeder, were you familiar with  
16 the fact when you signed the license that there was a  
17 specific provision under those licenses which inured to  
18 the benefit of successors and assigns?

19 A I read the licenses before I signed them.

20 Q And the fact was that each license said  
21 "manufactured and sold", read "manufactured and sold",  
22 you would have read that before you signed each license?

23 A Yes.

24 Q And the fact is that each one stated --

25 THE COURT: I assume that anything she signed is



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effective. Let us not go into that.

MR. COHN: Judge, I am going to be very brief.

Q Mrs. Schroeder, so the fact is that prior to the time that the deal was made to buy Mr. Schroeder's interest in Musicor, every recording covered in this case was covered by United Artists licenses, manufactured and sold, successors and assigns, is that right?

A As long as they were manufacturing and distributing, they would have the license, yes.

Q Under the Musicor label?

A It doesn't matter what label. The license was addressed to United Artists, and they paid us royalties. The label was merely an identity that we insisted on having.

Q And Musicor became the successor to United Artists?

A That is right, independently.

Q After Musicor became the successor and after --

MR. RICH: Are you using "successor" in a legal sense?

MR. COHN: I am using it in the sense of the license.

THE COURT: Let me hear the question, please.

Is there an objection?

MR. RICH: Yes. I object to the question.

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2 I would like to know in what sense he is using "successor".

3 THE COURT: You can go into that on redirect.

4 I would like you to go back and read the question  
5 about "successor".

6 (Record read.)

7 MR. COHN: I will start again.

8 THE COURT: Yes.

9 Q I want to go to the telephone conversation.  
10 Where Mr. Talmadge called you and said, "I have a batch of new  
11 licenses; why, when the United Artists licenses are there"  
12 -- what did you say to him?

13 A The United Artists licenses did not govern --

14 Q No. I want to know what you said.

15 A This is what I said.

16 Q You said that?

17 A The United Artists license couldn't govern and  
18 didn't govern because they were issued directly from us  
19 to United Artists. They were the licensee, they were the  
20 ones who were manufacturing and distributing the records,  
21 they were the ones who were paying us royalties. Now there  
22 was another company entirely, another corporation, and we  
23 don't accept licenses given to one company all of sudden  
24 being used by another company -- even know, if I issue  
25 a license to RCA --



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2 a notation.

3 Q How would you make the notation?

4 A There would be some -- on the face of the license  
5 that this license supersedes one that had been issued  
6 previously to Musicor.

7 Q The fact of the matter is that unless there is  
8 such a notation you would agree that the "do not super-  
9 sede" clause applies?

10 A Only in relation to Musicor.

11 Q I understand that.

12 MR. RICH: Can I ask that that question be rephrased?  
13 There was a rephrasing --

14 THE COURT: She interprets this language as  
15 affecting only licenses issued previously to the same  
16 company. That is her position. We have had it.

17 You have another position. You say that that  
18 limitation, so to speak, is not in the license.

19 MR. COHN: In the license.

20 THE COURT: That is a problem for me to worry  
21 about.

22 Q Now do I understand, Mrs. Schroeder, that you  
23 instructed the Harry Fox office in the fall of 1964 to issue  
24 only "manufactured" licenses to Musicor?

25 A Yes.

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Mrs. Schroeder-C

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Q Isn't it a fact that during 1965, 1966, 1967, 1968 and 1969 the Harry Fox office, acting as agent for January, Sealark and other companies controlled by you and your husband issued a series of "manufactured and sold" licenses to Musicor?

A If they did it was due to their inefficiency, most unfortunately.

Q Well, didn't you review the licenses?

A No, I am afraid that as an organization grows, as our organization grew, I could not look at each and every license, and our organization has grown considerably.

Had I seen it I certainly would have called the Fox office and had them reissue the license in an appropriate manner.

Q Do you agree that Mr. Talmadge faces the same mechanical problem you did with regard to reviewing the terms of each license?

A No, I would expect that a record company has people who are authorized to review the licenses and take care of that.

Q You say that the responsibility is on someone at the other end, the manufacturing end, but not on the end of the one issuing the license?

A That is right. If I am willing to accept



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what has been signed by me or my agent signed it on my behalf, the other side should be willing to.

Q You are willing to accept the manufactured and sold license issued by Harry Fox in this case?

A Unfortunately, if they were inefficient enough to issue a manufactured and sold, we will have to leave it up to the Court to decide whether it was right or wrong.

Q Do you now know, since the case began, including the pretrial, that the fact is that Harry Fox over a four and one half year period issued a series of manufactured and sold licenses to Musicor?

A I thought there were a few. I wasn't really aware -- at this time I can't remember back through the years. I wasn't aware that there was a significant amount.

Q When did this first come to your attention?

A I can't say.

Q Can you tell us approximately or just within the last few months or five years?

A Oh, no, I would say when we were involved in litigation.

I am afraid I can't.

Q A few years ago?

A Possibly.

Q Did you write to Harry Fox?

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2 A I did not write to Harry Fox as much as I  
3 picked up the phone and called.

4 As our agent we have lots of conversations with  
5 them and I would have called to voice my objection.

6 Q Well, did you, Mrs. Schroeder?

7 A Yes.

8 Q Did you voice it to Mr. Talmadge of Musicor?

9 A No, this is the responsibility of Fox, and I  
10 would voice it to Fox and have them call the record company.

11 Q But you did not write?

12 A Not to my recollection.

13 Q Now did you receive a copy of the first Harry Fox  
14 audit?

15 A Me personally, no.

16 Q I do not mean you personally. Did your companies --  
17 you handled the business for the companies --

18 A Yes.

19 Q -- as your husband testified?

20 A Yes.

21 Q Was a copy of the audit received by your company?

22 A Not by our companies. I presume it was our  
23 attorneys or accountants who received the copy.

24 Q Did your attorneys or accountants discuss it  
25 with you?



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A Only to say that they had the information and they were holding onto it until it was necessary to use it in litigation.

Q Did they tell you that the Fox office had sharply challenged reserves --

A No.

Q They did not?

A No.

MR. RICH: Objection to any communication between attorney and client.

THE COURT: Is this about an attorney?  
I thought this was Fox.

MR. RICH: I thought she said the attorney.

MR. COHN: No, she said the accountants and attorneys.

THE WITNESS: I am sorry, I thought you meant Fox, too.

MR. RICH: The question I think was directed to the attorneys.

MR. COHN: I think she said that the Fox report --

MR. RICH: May we have the question re-read?

MR. COHN: I can tell you. She said the report went not to her but to her attorneys and accountants and she discussed it with them. I am now asking her, in the

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2 course of the discussion with the attorneys and the ac-  
3 countants whether or not they told her that Fox was taking  
4 sharp issue with the reserves.

5 MR.RICH: Objection.

6 THE COURT: I see no provilege. Overruled.

7 A Now I understand. I don't recall.

8 Q You don't know one way or the other?

9 A No.

10 Q The minute you would have heard the word  
11 "reserves" you would have said "Who cares about reserves.  
12 Our license is manufactured,and it couldn't be reserves".

13 A Right.

14 Q Did you ever say that?

15 A I said that but I don't know whether I said it  
16 at thattime. I don't want to tell you when I am not  
17 sure.

18 Q When is the first time that you ever said to  
19 Harry Fox office "You people are auditing and considering  
20 reserves. That is wrong, because I am not licensed to  
21 be just manufactured", and "reserves would be another  
22 manufacturer."

23 When did you say that in substance, to whom and  
24 on what date?

25 A I said to Al Berman "Don't audit on our behalf.



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2 Dont' include us in the audit. We are not to be included  
3 in the audit."

4 They were my agents.

5 Q Mrs. Schroeder, didn't you testify to the exact  
6 contrary, that you told Mr. Berman at the time of the  
7 first audit, "We want to know exactly what the picture  
8 is, because we might be preparing some litigation and we  
9 want an audit. We want to know what the figures are as  
10 they pertain to us"?

11 A I believe I said that if their auditors had  
12 any information with regard to the audit that referred to  
13 our firms I would certainly like to know about it because  
14 it would be helpful in the litigation, but I did not use the  
15 words you just used.  
16  
17  
18  
19  
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2 Q All right. Taking your word, after you told  
3 Fox you wanted to know about this, it was after that that  
4 Fox sent a copy of this audit report to your representative;  
5 is that right?

6 A I presume so.

7 Q Can't you recall now that your representatives  
8 told you that the major disputed figure in the whole re-  
9 port involved reserves? You can't recall one way or the  
10 other on that?

11 A No, I wouldn't have taken into consideration  
12 reserves or what they had to say, nor would my advisers  
13 because we were unconcerned with the audit as far as the  
14 audit was concerned; we were only interested in that infor-  
15 mation to use in the litigation.

16 THE COURT: Can we shortcut this? I under-  
17 stood you to say that you talked to Mr. Berman in early  
18 1965, at that time you were already having some problems  
19 with Talmadge, right?

20 THE WITNESS: Right.

21 BY THE COURT:

22 Q And at that time you discussed, among other  
23 things, the possibility of an audit, right?

24 A Mr. William Lazarow.

25 Q Okay. And you sent your own auditor in early



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2 1965, right?

3 A That's right.

4 Q Okay. But you also told us, I believe, that  
5 if there was to be any audit conducted by the Fox office,  
6 you would want to be informed of the specific information  
7 uncovered by your companies?

8 A Right.

9 Q Okay. Now, we know that there was an audit  
10 conducted in 1968 and that there was specific information  
11 developed in that audit about your companies?

12 A Right.

13 Q We have that document. Were you informed of  
14 that specific information pursuant to the request that you  
15 had made to Mr. Berman?

16 A The information was given not to me but to---  
17 I'm pretty sure it was my attorney.

18 Q What's his name?

19 A Walter Hofer, Hofer & Rich.

20 Q Was that information relayed to you by those  
21 attorneys?

22 A Not specific information. We didn't sit down  
23 and analyze that information.

24 Q Mrs. Schroeder, I don't have time for whether  
25 it's specific or general, and I don't care whether you sat

1 eljp 3

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2 down or talked on the phone. Did you get in some form the  
3 substance of what had been found out in that audit?

4 A That they owed us money.

5 Q And did you get an idea of the amount?

6 A I don't recall.

7 Q Did you get an idea of the basis for the dis-  
8 crepancies that were found out in that audit?

9 A I can't be of too much help as far as what  
10 information was given to me in 1968, at this point.

11 Q Your action was filed in October 1968, right?

12 A Yes, sir.

13 Q That audit report is dated--

14 MR. COHN: May 13th.

15 Q May, 1968. Did this audit report constitute  
16 one of the things leading to the litigation?

17 A We had conducted our own audit, which was much  
18 more influential on us to instigate the litigation. But  
19 also the breakdown in relationships between Musicor and  
20 the publishing firms was another reason. I don't believe  
21 that this audit was as influential as those other reasons.  
22 This was just one more--

23 THE COURT: Mr. Cohn, I certainly think it is  
24 relevant to know what practice they followed and accepted  
25 during this time, but I will say this, that the complaint



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2 filed in October alleges that there was a discrepancy be-  
3 cause they filed to follow the manufactured formula. So  
4 at least as of that time they were complaining and if they  
5 learned about the May audit, you know, I don't know where  
6 that gets us.

7 MR. COHN: It gets us here, your Honor. The  
8 testimony of the witness saying only manufactured. You  
9 have a series of--you have the custom and usage in the in-  
10 dustry; you have the common sense that somebody doesn't  
11 pay \$150,000 to be bankrupted the next day--

12 THE COURT: Let's focus on this.

13 MR. COHN: Okay. And then you have on top of  
14 that, that you have the agent, the Fox office conducts it-  
15 self on a manufactured and sold basis, comes up with a  
16 reserve figure. There has to be some point in life, we are  
17 now four years after this whole thing started, and some  
18 point during the four years and some point after the four  
19 years--

20 THE COURT: I'm just focusing on on her knowl-  
21 edge from May of '68 on.

22 Anything else, Mr. Cohn?

23 MR. COHN: Yes, your Honor.

24 BY MR. COHN:

25 Q By the way, I believe you testified that you did

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2 not until I guess it was around December sometime that  
3 Musicor under Mr. Talmadge's exclusive ownership was in  
4 business issuing recordings on its own?

5 A I didn't say that.

6 Q I thought you said that it what triggered off  
7 the--

8 A He was certainly manufacturing other records,  
9 but as far as the records that had been distributed by  
10 United Artists, I did not know the cutoff date of United  
11 Artists manufacture and distribution and the date upon which  
12 Musicor under Mr. Talmadge's direction manufactured and  
13 distributed those same records.

14 Q Do you read Billboard an industry publication?

15 A Not too much.

16 Q You don't?

17 A I don't have time for it, unfortunately.

18 Q Is it received after you subscribe to it?

19 A Absolutely.

20 Q Is it received in your office?

21 A Yes.

22 Q Placed on your desk?

23 A No.

24 Q Did you read a front page story on September 19,  
25 1964 in Billboard concerning Musicor Publishing?



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THE COURT: What's the name of the publication?

MR. COHN: Billboard.

Q By the way, Billboard is the standard publication in the music and record publishing business, isn't it?

A It's one of several publications in the music business.

Q Is it one of the leading ones?

A Absolutely.

Q Is it good enough so that you subscribe to it, isn't it?

A Certainly. We subscribe to all of them.

Q Did you see a publication on the front page of September 19, 1974 Billboard concerning Musicor Publishing under its own label?

A I would say that I didn't.

Q You did not see it. You say it was not till sometime in December that you knew that Musicor under Mr. Talmadge was doing its own manufacturing and producing?

A I really have to repeat my answer. I said that I certainly knew that Musicor was entitled to produce new recordings and manufacture and distribute them, but that there were the old recordings manufactured and distributed by United Artists, which is something else.

Q By the way, the producer's agreement which Mr.

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2 Rich showed you on your direct examination, do you recall  
3 that? There were two agreements?

4 A Yes.

5 Q Right? One where you and Mr. Schroeder or Mr.  
6 Schroeder was paid \$150,000 for the Schroeder interests in  
7 Musicor, and there was a second agreement, Mr. Rich examined  
8 you about which was a producer's agreement in which the  
9 Schroeder interests were to do some producing for Musicor;  
10 is that right?

11 A Not for Schroeder interests. That is Aaron  
12 Schroeder, yes.

13 Q I assumed Aaron Schroeder is one of the Schroe-  
14 der interests, but let's say Aaron Schroeder.

15 A We have many people that work with us, and this  
16 was Aaron Schroeder's agreement with Musicor.

17 Q Obviously you were the one who negotiated the  
18 agreement, since he doesn't do any business.

19 A In the main, yes, with our attorneys.

20 Q That paragraph that Mr. Rich referred to, con-  
21 cerning the royalty arrangements, that referred to record-  
22 ings to be produced pursuant to that agreement after its  
23 signatory date in 1964, didn't it?

24 A The point that--

25 Q Could you just--



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2 A I'm explaining why it was put into the agree-  
3 ment.

4 Q Doesn't that paragraph, this was a production  
5 agreement, right?

6 A That's right.

7 Q So that from this date on, under certain terms  
8 and conditions Aaron Schroeder will produce certain record-  
9 ings for Musicor?

10 A That's right.

11 Q And this paragraph which Mr. Rich called your  
12 attention to appears in that agreement, does it not?

13 A That's correct.

14 Q Let me ask you this, by the way, Mrs. Schroe-  
15 der. You heard Mr. Moelis' testimony?

16 A Yes, I did.

17 Q Were you the one with whom Mr. Moelis had the  
18 conversation referred to in his letter, rather than Mr.  
19 Schroeder?

20 A I don't exactly recall that conversation.

21 Q Do you know Mr. Moelis?

22 A Yes, I do.

23 Q Well, do you deny the conversation with Mr.  
24 Moelis in the course of which you confirmed to him that  
25 the rate on pre-1964 albums was to be a penny and a half?

1 eljp

Mrs. Schroeder-cross

2 A Yes, we would never agree by telephone with any-  
3 one.

4 Q Not what we would do, do you deny telling it,  
5 confirming to Mr. Moelis that Aaron Schroeder agrees to  
6 a penny and a half rate on pre-1964 recordings?

7 A Yes.

8 Q Did you know that Mr. Moelis was Mr. Talmadge's  
9 attorney at this time?

10 A Yes, certainly.

11 Q Do you recall the conversation?

12 A I recall conversations about rates with Mr.  
13 Talmadge. I recall conversations with Mr. Talmadge's  
14 attorneys, Mr. Asher and Mr. Moelis. I can't pinpoint  
15 whether it was Mr. Moelis or Mr. Asher or both on the tele-  
16 phone with us. I can't tell you if Mr. Talmadge was also  
17 on that telephone call or if it was a few telephone calls.

18 Q In other words, I gather the substance of all  
19 of that is you are not in a position to confirm or deny--

20 A A particular conversation.

21 Q Yes.

22 A No, I can confirm that conversations were held  
23 with all of them.

24 Q But you can't confirm this particular one?

25 A No.



1 eljp

Mrs. Schroeder-cross

2 BY THE COURT:

3 Q On this Exhibit 20, paragraph 14 it says any  
4 and all mechanical royalties which may become due hereunder  
5 from the company to Schroeder--skipping a few words--in  
6 respect of any master recordings produced hereunder shall  
7 be at full statutory rate.

8 The language I want to ask you about is, any  
9 master recordings produced hereunder. That means under  
10 the production agreement, right?

11 A That's right.

12 Q Okay. Now, that would apply to new songs pro-  
13 duced by your husband, right?

14 A Yes.

15 Q It would not apply to the reissue of old record-  
16 ings, would it?

17 A No, it was specifically left out. We didn't  
18 agree to it.

19 Q Wait a minute. Please. Because when I first  
20 read this, frankly, I didn't understand how general or how  
21 limited.

22 A That is for new recordings, yes, under this  
23 contract.

24 THE COURT: I understand that.

25 BY MR. COHN:

1 eljp

Mrs. Schroeder-cross

2 Q Mrs. Schroeder, I understood you to say, and  
3 maybe I was wrong, that there was some prohibition against  
4 cross collateralization in any of the licenses which we  
5 have been discussing in this case.

6 Can you point to any such provision in any  
7 license? The United Artists licenses, Harry Fox licenses--

8 THE COURT: Please. Let's not have this wit-  
9 ness interpreting the document.

10 MR. COHN: I would ask her if she can point to  
11 any of them in which she can point to a provision again  
12 cross collateralization.

13 A Absolutely. For a specific record number, and  
14 I can only take returns on that record number. And that  
15 is common knowledge in the industry.

16 THE COURT: You can take returns on a record  
17 number?

18 THE WITNESS: On that record.

19 THE COURT: Where does it say you can take re-  
20 turns only on a specific record? Here is the license.

21 THE WITNESS: It is issued for a specific record  
22 number right here. That is the reason we put the record  
23 number on a license.

24 THE COURT: The thing that confuses me is, when  
25 you said you can only take returns for the specific record



1 eljp

Mrs. Schroeder-cross

2 number. Maybe I am missing something, and I don't want to  
3 have you worried about interpreting documents.

4 THE WITNESS: Cross collateralization he is  
5 talking about--

6 THE COURT: Please. Am I missing something?  
7 Is there any language about taking returns only on specific  
8 record numbers on the licenses?

9 THE WITNESS: In relation to cross collateralization.  
10

11 THE COURT: In relation to anything.

12 THE WITNESS: That is what I am talking about.  
13 He can't get a record--I am not understanding--

14 THE COURT: Go ahead, Mr. Cohn.

15 Q I think your answer to his Honor's question is,  
16 there is nothing in the license that you are referring to,  
17 custom or--

18 A It has nothing to do with custom. The license  
19 is for a specific recording.

20 Q There is nothing, just to end this area, there  
21 is nothing you can point to in the license that says there  
22 cannot be cross collateralization?

23 THE COURT: I don't think there is, Mr. Cohn.  
24 I have looked at it. Unless it is implicit or something.

25 Q By the way, you tied that in with the return

1 eljp

Mrs. Schroeder-cross

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2 picture; is that right?

3 A What did you mean by cross collateralization?

4 THE COURT: Please, I tell you, we have to end  
5 this trial. Maybe Mr. Cohn--please don't ask Mr. Cohn  
6 questions. You answer. If you don't understand the ques-  
7 tion--

8 Q The last question, you interpret the cross  
9 collateralization as you have told us as with reference to  
10 returns of a particular recording; is that right?

11 A There is nothing that can affect one recording  
12 to the other, by license.

13 Q With reference to returns?

14 A Whether it is returns or anything else.

15 Q As a matter of fact, you used the word returns  
16 in answering his Honor before; the fact is, if it were an  
17 intention of the parties if it be a limitation to manufacture,  
18 there could never even be any discussion or possibility of  
19 returns, could there?

20 A That's right.

21 THE COURT: Why did you refer to returns, then?

22 THE WITNESS: I was answering his question on  
23 cross collateralization.

24 THE COURT: Was it your understanding that there  
25 could be under these licenses, there could be credits for



1 eljp

Mrs. Schroeder-cross

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2 returns in the case of returns of the specific record?

3 THE WITNESS: If the license provided for it,  
4 yes.

5 THE COURT: It would have to specifically pro-  
6 vide?

7 THE WITNESS: Yes.

8 THE COURT: Anything else?

9 BY MR. COHN:

10 Q By the way, United Artists, you referred to a  
11 number of times to when United Artists had the license. The  
12 United Artists didn't manufacture itself, did it?

13 A They ordered the manufacture of Musicor under  
14 Mr. Schroeder, the identity of Musicor. We never had any-  
15 thing to do with the manufacture of records physically.

16 Q As a matter of fact, United Artists was a dis-  
17 tributor, was it not?

18 A The distributor and they ordered the manufacture,  
19 yes.

20 MR. COHN: That's all, your Honor.

21 REDIRECT EXAMINATION

22 BY MR. RICH:

23 Q Mrs. Schroeder, there was some testimony before  
24 on a question, I don't know if it was in context or not.  
25 It said whether or not Musicor was a successor of United

1 eljp

Mrs. Schroeder-redirect 519

2 Artists on the licenses--

3 THE COURT: Please, that is a legal question.

4 Q Is Musicor a successor--

5 THE COURT: Don't bother with that. That is for  
6 me to decide.

7 MR. RICH: That's all.

8 (Witness excused.)

9 THE COURT: Let's have the next witness.

10 MR. COHN: Can we take five minutes?

11 THE COURT: All right. We will take a very short  
12 break. I was serious when I wanted to finish today. If  
13 you are serious, we can get the proof. We will take a  
14 five minute break and then what do we do, go to Mr. Straus?

15 MR. RICH: Yes, sir.

16 MR. COHN: We have one short witness, your  
17 Honor, which should just take about five minutes. Then we  
18 have Mr. Straus and Mr. Steinberg; is that it?

19 THE COURT: That's it.

20 MR. RICH: Your Honor, I may have to ask Mr.  
21 Talmadge some questions, too.

22 MR. COHN: Do you have any time tomorrow morn-  
23 ing, in case we run over this afternoon?

24 THE COURT: I will worry about that later.

25 (Recess.)



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2 THE COURT: All right. Mr. Straus, please.  
3 S E Y M O U R S T R A U S, recalled.

4 THE COURT: You are under oath, Mr. Straus.

5 MR. COHN: Your Honor, may I put on my short  
6 witness?

7 THE COURT: Okay. Who is that?

8 MR. COHN: Krasilovsky.

9 THE COURT: All right.

XX 10 M A R V I N W I L L I A M K R A S I L O V S K Y,  
11 having been called as a witness on behalf of the  
12 defendants, was duly sworn and testified as follows:

13 DIRECT EXAMINATION

X 14 BY MR. COHN:

15 Q Mr. Krasilovsky, are you a member of the Bar?

16 A Yes, I am.

17 Q For how long a period have you been?

18 A Since 1949 originally, in a different juris-  
19 diction. 1953 in this jurisdiction.

20 Q What is your specialty?

21 A Music copyright law.

22 Q How long a period of time have you been practic-  
23 ing in connection with music copyright law?

24 A Since approximately 1954.

25 Q Did you ever hear of a book called The Business

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2 of Music?

3 A I'm a co-author with Sidney Schemmel, of that  
4 book.

5 Q The Business of Music has appeared in a series  
6 of editions?

7 A Yes, it has.

8 Q Rising above modesty, is the book regarded as  
9 the Bible in its category in the industry?

10 A It's had favorable reviews from the American  
11 Library Association and the New York Times and Norman  
12 Stone.

13 Q Drawing upon your years of experience and your  
14 knowledge of the music and music copyright business, I want  
15 to ask whether or not at our request you examined, first  
16 of all United Artists licenses--I'm sorry--licenses issued  
17 by Aaron Schroeder interests to United Artists as distribu-  
18 tors for Musicor labels? Do you have a copy of the United  
19 Artists licenses?

20 THE COURT: Here is HH-1.

21 MR. RICH: Your Honor, do you have HH-2 that I  
22 could see?

23 (Pause.)

24 MR. RICH: I have one.

25 THE COURT: Have you read it before?



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2 THE WITNESS: No, I haven't, your Honor.

3 THE COURT: There must be some specific points.

4 Q We talked about it. I don't think I ever showed  
5 it to you. I direct your attention to the first paragraph,  
6 the word "successor."

7 The agreement running to the benefit of the  
8 successors or assigns.

9 A Yes, I see.

10 Q Have you examined a copy of Exhibit--looks like  
11 Z, being an agreement between United Artists records and  
12 Musicor--I'm sorry, I just showed this to you.

13 A I briefly reviewed excerpts of Exhibit Z.

14 THE COURT: May I see that?

15 MR. COHN: Yes, your Honor.

16 THE COURT: Z has not been offered into evi-  
17 dence, but you offer it?

18 MR. COHN: Yes, your Honor, the top page.

19 THE COURT: Any objection?

20 MR. RICH: Yes, your Honor. I don't think it is  
21 relevant to this suit.

22 THE COURT: Isn't this the agreement--

23 MR. COHN: I offer the whole thing, your Honor.  
24 The first page is a recap of the agreement. The balance  
25 is the actual agreement between Mr. Talmadge, between

1 eljp

. Krasilovsky-direct

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2 Musicor and United Artists.

3 THE COURT: October 5, 1960. Look, Mr. Rich,  
4 I don't want to spend a lot of time on this. I thought  
5 this was one of the basic agreements in the case, and I  
6 know it was identified earlier.

7 MR. RICH: It was identified earlier, your  
8 Honor. It was discussed earlier. Earlier. I don't be-  
9 lieve there was any testimony, although I'm not quite sure  
10 if Mr. Talmadge had touched on it briefly. I don't feel  
11 as though a 1960 agreement between U.A. and Musicor is at  
12 all relevant to this lawsuit, to any of the issues.

13 THE COURT: What is Exhibit Z?

14 MR. RICH: Isn't that the agreement, your Honor,  
15 with United Artists and Musicor?

16 THE COURT: I will overrule the objection and  
17 receive it.

18 MR. RICH: Your Honor, may I just make sure  
19 which one this is?

20 THE COURT: That is what it says.

21 MR. RICH: That is a 1960 agreement.

22 THE COURT: Yes.

23 (Defendants' Exhibit Z was received in evidence.)

24 Q I want to direct your attention to the language  
25 at the end of the term of the agreement. United Artists



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2 writes with respect to the master's cease, except, how-  
3 ever, that United Artists may continue to sell its inventory  
4 of Musicor Records for six months thereafter. Have you  
5 noted that?

6 A I previously noted that during a recess in the  
7 trial.

8 Q Thank you.

9 A I--

10 MR. RICH: There is no question before you, Mr.  
11 Krasilovsky.

12 MR. COHN: Your Honor, would you have the ex-  
13 hibit of the agreement between Musicor and United Artists  
14 in 1964? Do you have the number of that exhibit?

15 THE COURT: That is Y, and I think I have a  
16 copy. October 7, 1964?

17 MR. COHN: Yes, your Honor.

18 THE COURT: All right. This isn't the original,  
19 but I will provide it (handing).

20 Q I would now like to refer you to Exhibit Y in  
21 evidence, which is an agreement dated October 7, 1964 con-  
22 cerning the taking over of United Artists rights by Musicor  
23 as of a certain date.

24 MR. RICH: I will object to that characteriza-  
25 tion, your Honor. The agreement will speak for itself.

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THE COURT: What is your question, Mr. Cohn?

Q Would you examine that, please?

THE COURT: Are you referring to that paragraph 6?

MR. COHN: I am really referring to the whole agreement, your Honor.

A All right, I have.

Q All right. Mr. Krasilovsky, drawing upon your expertise in the industry and in this field of law, did Musicor become the successor to United Artists with reference to the licenses from the Schroeder interests to United Artists?

MR. RICH: Objection, your Honor. Obviously the agreement speaks for itself and your Honor will have to interpret the language that is used in that particular agreement. The witness is being called upon to interpret language, which is your Honor's phase.

THE COURT: I will overrule the objection.

A I am quite familiar with the distribution deal. Exclusive distribution deal is exemplified by Exhibit Z. The right to continue to distribute and sell ceased under Exhibit Y and the successor in distributing and selling of the masters referred to is clearly given up to the addressee, which is Musicor Record Corporation.



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2 Q As of October, 1964?

3 A As of, the language says in the first sentence  
4 of item 1, October 7, 196--

5 THE COURT: What exhibit?

6 THE WITNESS: Of Exhibit Y. I believe it says  
7 October 7, 1964.

8 THE COURT: Okay.

9 Q Your testimony is as of that date on their  
10 acquisition of the rights to the masters, Musicor became  
11 the successor under the terms of the licenses to United  
12 Artists?13 A Musicor became the successor of the rights  
14 that previously were exercised and owned or controlled by  
15 United Artists.16 Q Just one more thing. There's been a lot of  
17 testimony in this case concerning the terms manufactured  
18 and manufactured and sold. With respect to mechanical  
19 licenses, drawing again upon your expertise, what is the  
20 custom and usage in the industry with respect to a pro-  
21 vision concerning manufactured, versus manufactured and  
22 sold?23 A In my experience in dealing with music pub-  
24 lishers, record companies and other interested parties,  
25 manufactured and sold is the general manner of licensing

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2 and collecting from a normal business relationship.

3 With relation to bootleggers or near bankrupt  
4 or dangerously small manufacturers, it has been the prac-  
5 tice of many of my clients to give a very rare instance of  
6 a manufactured license--

7 Q With the exception of the general categories  
8 you have mentioned, people who you described as industry  
9 bootleggers and companies near bankruptcy, the provision  
10 is manufactured and sold?

11 A That's right.

12 MR. COHN: No further questions, your Honor.

13 THE WITNESS: Excuse me. I will give you one  
14 exception. There is one prominent company called the  
15 Sam Fox Company which I feel of recent date has just gene-  
16 rally taken an attitude they want to have a manufactured  
17 license. That was told to me within the last two months  
18 by Mr. Al Berman. It is one of the exceptional clients  
19 among his many that has this policy.

20 THE COURT: The Sam--

21 THE WITNESS: The Sam Fox Company. No relation  
22 to the Harry Fox Agency.

23 THE COURT: You focused on paragraph 1 in  
24 Exhibit Y about this successor point. My understanding  
25 of the facts is that there were licenses issued to United



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2 Artists for particular compositions to be embodied in  
3 particular records; right?

4 THE WITNESS: That's right.

5 THE COURT: United Artists had the right, I  
6 guess the exclusive right to distribute those particular  
7 records?

8 THE WITNESS: That's correct.

9 THE COURT: Now we come along to October, 1964  
10 and Mr. Talmadge has left United Artists and there is going  
11 to be a kind of transfer of, I am just speaking roughly,  
12 a transfer of rights, and so forth, to Musicor from United  
13 Artists. I am just speaking very roughly, right?

14 THE WITNESS: Yes.

15 THE COURT: If there was a master recording and  
16 if there were tapes and other items related to those rec-  
17 ords referred to in the United Artists licenses, some  
18 disposition would have to be made of all that material,  
19 right? You'd have to decide who has a right to have it;  
20 is that right?

21 THE WITNESS: Who has a right to possess the  
22 stampers of the master tapes and to take the inventory.  
23 There was some discussion of selloff of inventory in the  
24 paper I just looked at. The right to reproduce from the  
25 master is different from the inventory of items previously

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2 reproduced and in the warehouse.

3 THE COURT: Okay. What I want to know is, what  
4 does this paragraph 1 relate to, and I guess the distinction  
5 I'm interested in the right to handle the existing inven-  
6 tory or keep on making more records of this particular  
7 record number, and I am distinguishing that from making  
8 some new record of the same composition.

9 THE WITNESS: Which is completely irrelevant.  
10 The last item you mentioned is completely irrelevant to  
11 any distribution deal except--it is to, excuse me, in my  
12 hasty reading of Exhibit Z, the large agreement, in my  
13 hasty reading of that, it seemed there was some exclusive  
14 right to become the exclusive distributor of future masters  
15 that would be produced in a studio thereafter. This par-  
16 ticular document you are now referring to Exhibit Z--

17 THE COURT: No, I have Y.

18 THE WITNESS: Exhibit Y is the short one, the  
19 termination, it says--in my hasty reading of it I noticed  
20 as of the close of business on October 7, 1964 the under-  
21 signed's right to distribute and sell Musicor record  
22 inventory in the U.S.A. as distinguished from the under-  
23 signed's right to distribute and sell through the Columbia  
24 Record Club--well, that is a completely different matter.

25 THE COURT: I guess we don't have to worry about



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2 that.

3 THE WITNESS: "Shall cease." I am reading the  
4 first sentence of paragraph 1 of Exhibit Y.

5 THE COURT: I have to keep getting oriented on  
6 the facts of this case. I will ask Mr. Rich and Mr. Cohn,  
7 the new licenses, did they--the so-called new licenses of  
8 October and December and so forth, in 1964 did they simply  
9 involve the rerecording of exactly the same records on  
10 exactly the same labels? Didn't they?

11 MR. COHN: Yes.

12 MR. RICH: First of all, there were two dif-  
13 ferent categories. Some were new recordings that had not  
14 been recorded prior to the purchase agreement or to October  
15 --or to June, 1964.

16 THE COURT: I am talking about the ones involved  
17 in our case.

18 MR. COHN: The answer is yes, your Honor, it  
19 was a reissue.

20 THE COURT: I have been assuming that we were  
21 talking about the same compositions, the same records,  
22 the same label, isn't that correct?

23 MR. COHN: Absolutely.

24 THE COURT: Mr. Rich?

25 MR. RICH: Yes. I don't know if--

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2 THE COURT: Is the answer yes?

3 MR. RICH: I don't know if the label--

4 THE WITNESS: It's the same composition. It's  
5 the same recording but I don't know if the label is iden-  
6 tical. I don't know whether it says Musicor or United  
7 Artists. But it is the same recording.8 THE COURT: And except for possibly taking off  
9 United Artists' name somewhere, it's the same label; it's  
10 the Musicor label?

11 MR. RICH: Yes.

12 THE COURT: And this would be done by using the  
13 same master or whatever you do and just making more records  
14 from that master, right?

15 MR. RICH: Yes.

16 THE COURT: Okay. Does this paragraph 1 in  
17 Exhibit Y, according to the interpretation, I know it doesn't  
18 bind me, but I am just interested, from this United Artists  
19 gives to Musicor the inventory, right?

20 THE WITNESS: It seems so.

21 THE COURT: Okay.

22 THE WITNESS: The footnote refers to an inven-  
23 tory item.24 THE COURT: And also it turns over all master  
25 recordings and other things used by the undersigned, namely,



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2 United Artists, in the manufacture of Musicor records,  
3 right?

4 THE WITNESS: It seems so.

5 THE COURT: What that means is those physical  
6 things are turned over to Musicor, right?

7 THE WITNESS: Together with the tangible right  
8 of reproduction thereafter and distribution. The physical  
9 and plus intangibles--

10 THE COURT: Where does it say that?

11 THE WITNESS: The right to distribute.

12 THE COURT: Where does it say that?

13 It says right to distribute and sell Musicor  
14 record inventory.

15 THE WITNESS: See, I'd have to inspect it  
16 closer to see if what I judge to be a standard distribu-  
17 tion deal is expressed here.

18 THE COURT: It says in fact, the first sentence  
19 is, United Artists' right to distribute and sell Musicor  
20 record inventory shall cease. That is the first sentence.

21 It's the second sentence which talks about  
22 turning over whatever is to be turned over. It is very  
23 important apparently to decide whether this somehow trans-  
24 fers to Musicor or assigns to Musicor the right, the license  
25 right to keep on producing, whether it makes then Musicor

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2 responsible for royalties on future records made; do you  
3 get me?

4 THE WITNESS: I do.

5 THE COURT: You look at the document with that  
6 in mind.

7 MR. COHN: Your Honor, with your permission I  
8 was also going to call the witness' attention from Exhibit,  
9 I guess this is Y, isn't it--no, this is ZZ in evidence.  
10 No, I'm scrry, this is Y. Would you also look at this,  
11 please, Mr. Krasilovsky?

12 THE COURT: What is that--

13 MR. COHN: That is paragraph 6.

14 THE COURT: You look at the whole agreement,  
15 Mr. Krasilovsky.



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/1 pm2

2 THE COURT: Since the witness has to study the  
3 document we will recess for a few minutes while I take the  
4 bail application matter in the robing room.

5 (At this juncture a criminal matter was  
6 taken in the robing room.)

7 BY MR. COHN:

8 Q Mr. Krasilovsky, having examined Exhibit Y and  
9 Exhibit ZZ, can you give his Honor -- can you refer his  
10 Honor to the passages based upon which you reached a  
11 conclusion that Musicor became the successor to United  
12 Artists --

13 THE COURT: No, I asked him a different  
14 question. I asked him to examine this agreement, and  
15 we all can see that it provides for the turnover of the  
16 physical master recordings and so forth, but I asked you  
17 if, on the basis of your knowledge of the industry, if  
18 that is relevant here, if you can tell me whether this  
19 agreement means that the license rights are assigned  
20 or transferred to Musicor and the responsibilities for  
21 paying royalties thereunder.

22 That is my question.

23 THE WITNESS: I noticed particularly the  
24 end of paragraph 1 and the full body of paragraph 6.

25 The end of paragraph 1 says that they will turn

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over the basic materials from which more records are made,  
master recordings, mothers, stampers, plates, separations,  
slicks, art work and other items used by the undersigned  
in the manufacture of Musicor records.

Now that implies that they are contemplating  
future manufacture.

Then on item 6 they say "We will turn over to you  
the reserves we have held under our mechanical licenses" --  
that is monetary reserves -- "and you are going to take  
full and complete responsibility for paying the mechanical  
licensors or any moneys that are then owing or thereafter  
to be owned".

That is the way I interpret this, and I believe  
that that means that there is a reference to a mechanical  
license and that Musicor becomes a successor thereunder.

THE COURT: All right.

MR. COHN: I have nothing further.

THE COURT: All right. Any cross examination?

CROSS EXAMINATION

BY MR. RICH:

Q Mr. Krasilovsky, isn't it a fact that in many,  
if not most agreements made with a corporate entity or  
an individual that there is language that the contract is  
binding on the successors and assigns of the corporate



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Krasilovsky-cross

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entity? Isn't that correct?

A In many boiler plate contracts, whether it is real estate or music, that phrase is used.

Q Right, and as that phrase is generally used, doesn't it mean that if someone or a party or a corporation purchases or acquires that particular company or that -- well, let us say the company itself -- in other words, in the particular case under the United Artist license agreement, that if another company acquires United Artists Records, Inc., this license -- and the assets of United Artists were transferred to that company, that other company would be a successor and assign, isn't that correct?

THE COURT: May I interrupt you? Let me just ask -- and you may then go back to this , Mr. Rich.

Do you have that Exhibit Y?

THE WITNESS: It was taken back.

THE COURT: All right.

THE COURT: Looking at paragraph No. 6 it says "On or before January 15, 1965" --

It must be --

A VOICE: 1964.

THE COURT: Well, I think it is a typo, and it has been correct -- "the undersigned shall account to you", meaning United Artists shall account to Musicor --

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"for all royalty reserves" and so forth.

That deals with the question of reserves.

THE WITNESS: With the closeout of accounts.

THE COURT: Right.

THE WITNESS: Right.

THE COURT: And that would not in itself mean that there is an assignment.

THE WITNESS: That does not constitute an assignment in and of itself.

THE COURT: You are focusing on the next sentence, right, so far as paragraph No. 6 is concerned.

THE WITNESS: The next sentence reads:

"You agree to be solely responsible for any mechanical copyright royalties then or thereafter claimed in respect of any U.S.A. sales at any time."

THE COURT: That does not end the quote to me, because it says "sales at any time of Musicor Records by the undersigned or its distributors or licensees."

Is it not correct that that sentence refers to the responsibility of Musicor for royalties on any sales by United Artists? That is what is meant by "by the undersigned", doesn't it?

THE WITNESS: Now that you call my attention to it I see the direction.



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2 THE COURT: Okay. So when you gave your answer  
3 before you had not taken into account that language  
4 I just read to you.

5 THE WITNESS: Well, I was talking more about  
6 industry practice, your Honor.

7 THE COURT: Well, I am focusing on the agree-  
8 ment.

9 Thank you very much, but I think I have to  
10 interpret the agreement, and we will have another witness  
11 now.

12 Thank you.

13 Let us go to Mr. Straus.

14 MR. COHN: I am not going to call Mr. Steinberg,  
15 by the way.

16 THE COURT: Who?

17 MR. COHN: The detective, your Honor.

18 THE COURT: That really won't help me.

19 You mean about the cookout and all that?

20 MR. COHN: About going to the restaurant, the  
21 cookout and conducting business.

22 MR. RICH: Your Honor, we have no objection  
23 to him going on the stand.

24 MR. COHN: If you think it will not be helpful --

25 MR. RICH: Your Honor, we have no objection to the

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2 detective going on the stand to testify.

3 THE COURT: All right, let us have the  
4 detective.

5 MR. COHN: If you don't want the cookout,  
6 okay.

7 THE COURT: Let us have Mr. Straus now.

8 (Witness excused.)

9 S E Y M O U R S T R A U S, having been previously  
10 sworn, resumed and testified as follows:

11 THE COURT: All right, Mr. Rich, let's go.

12 DIRECT EXAMINATION (Continued)

13 BY MR. RICH:

14 Q When you were on the stand the last time,  
15 Mr. Straus, you were referring to a stipulation that was  
16 entered into between the parties that encompasses in the  
17 transcript, at the session of June 16, 1975 -- you may  
18 refer to that transcript if you need to.

19 A Will you wait one second while I get the copy  
20 to refer to it.

21 (Witness examines.)

22 THE COURT: All right, go ahead, Mr. Rich.

23 Q Mr. Straus, I call your attention to item No. 13  
24 which appears on page 169. This was with regard to the  
25 plaintiffs' claim of \$17,135.17, which is stipulated is



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2 due --

3 THE COURT: I can read the stipulation.

4 MR. RICH: I am not reading the stipulation.

5 THE COURT: If you question him I will get it.  
6 I do not understand why he even asked to testify about that  
7 particular point.

8 MR. RICH: Well, your Honor --

9 THE COURT: What is your question?

10 Q Mr. Straus, did you calculate the interest on  
11 \$17,135.17?

12 THE COURT: What do you mean by "calculate"?

13 MR. RICH: Your Honor, it is stipulated that amount  
14 of money is due. At one point --

15 THE COURT: If I rule in in your favor I will  
16 simply provide that there will be interest from a certain  
17 date, and you can calculate it. I will fix the percentage.

18 MR. RICH: All right. I did not understand that.  
19 About a week ago or two weeks ago you asked that Mr. Straus  
20 calculate it, and I thought you wanted me to go into it  
21 while he is on the stand.

22 THE COURT: No, of course not.

23 MR. RICH: All right.

24 THE COURT: Let us pass that. What is next?

25 MR. RICH: Okay, I misunderstood.

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2 THE COURT: What is next? Let us get to the next  
3 one.

4 Q Now with regard to Item No. 15, and this is concern-  
5 ing the cross-collateralization, Mr Straus, there is a claim  
6 of the plaintiff for \$7,283.56.

7 Will you please advise the Court as to how you com-  
8 puted that sum?

9 A I went through the royalty statements submitted  
10 by Musicor for the period from December 1964, I believe,  
11 to the beginning of 1972, and added up the amounts they  
12 deducted for returns which were applied against positive  
13 royalty reports -- in other words, returns against sales,  
14 returns of one record against sales of another record.

15 THE COURT: Let me ask you this: You went  
16 through the royalty statements of Musicor?

17 THE WITNESS: Correct.

18 THE COURT: And those royalty statements are --  
19 I do not think we have used that term, but just briefly,  
20 what is a royalty statement?

21 THE WITNESS: It is a statement submitted by  
22 Musicor to the publisher stating the amount of royalties,  
23 the royalty rate and the royalty paid.

24 THE COURT: You have copies of those with you?

25 THE WITNESS: Yes.



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1  
2 THE COURT: Just as a matter of practice, do  
3 I understand correctly that in some instances royalties  
4 are paid on a particular license?

5 THE WITNESS: Yes.

6 THE COURT: And on sales made, right?

7 THE WITNESS: Yes.

8 THE COURT: And then at a later point on that  
9 particular record under that particular license there are  
10 returns to Musicor?

11 THE WITNESS: Yes.

12 THE COURT: So you are telling us that when  
13 those returns come in they, meaning Musicor, on their  
14 royalty statements have a minus figure, meaning that they  
15 believe they paid too much royalties the first time and  
16 they are deducting now, after the returns have been  
17 received; right?

18 THE WITNESS: Right, from different records.

19 THE COURT: But the minus figures in those  
20 statements relate to the particular record on which the  
21 royalties had previously been paid and the returns have  
22 now come back, isn't that right?

23 THE WITNESS: That is correct.

24 MR. RICH: Are we talking about the same record?

25 THE WITNESS: Yes.

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2 THE COURT: On those statements they have a  
3 bunch of plus figures where on other records, they admit  
4 that royalties are due, isn't that correct?

5 THE WITNESS: That is correct.

6 THE COURT: And they simply subtract the minus  
7 figures representing what they believe were excess royalties  
8 paid because of the returns from the positive figures  
9 representing royalties due, is that right?

10 THE WITNESS: Correct.

11 THE COURT: And your figure is based upon --  
12 you have simply added up negative figures from the royalty  
13 statement, is that correct?

14 THE WITNESS: That is correct.

15 THE COURT: Why don't you put in evidence those  
16 royalty statements, Mr. Rich?

17 MR. RICH: Yes, your Honor. I offer them in  
18 evidence -- I would like to have them marked for identifi-  
19 cation first.

20 I am marking for identification, so that the  
21 record is meaningful, your Honor, a group of Musicor  
22 royalty statements issued --

23 THE COURT: We do not have to have a description;  
24 just get them marked.

25 MR. COHN: No objection to any of these.



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2 THE COURT: That is right, I am sure there 'sn't.  
3 What is the next exhibit?

4 THE CLERK: 23.

5 (Plaintiffs' Exhibit 23 was received in  
6 evidence.)

7 THE COURT: You know from the stipulation in  
8 our prior discussions that it was necessary for you, if you  
9 are going to sustain one branch of the plaintiffs' argument,  
10 to apprise me of the items in this claim which relate  
11 to the licenses which have a "manufactured" language.

12 THE WITNESS: Yes.

13 THE COURT: Can you do that or is there an agree-  
14 ment as to that?

15 THE WITNESS: The amount, your Honor -- I went  
16 through these statements again and I selected the record  
17 numbers here on the basis of records manufactured and sold  
18 for each period, and that total came out to \$666.40. That  
19 relates to --

20 MR. COHN: Your Honor, to save a little time  
21 I think we can stipulate all of these figures as broken  
22 down between "manfuactured" and "manufactured and sold"  
23 on a schedule prepared by Mr. Straus.

24 THE COURT: Excellent, wonderful! That is ex-  
25 actly what we need.

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2 MR. COHN: Okay.

3 THE COURT: Let us have that marked as the next  
4 Court's exhibit.

5 (Document marked Court's Exhibit B.)

6 THE COURT: That eliminates that problem.

7 Now can we go to the next question, Mr. Rich.

8 I want to know, Mr. Rich -- I assume this is still correct,  
9 as far as you are concerned.

10 MR. RICH: Yes, it is, your Honor.

11 THE COURT: Fine. Now let us go to the next  
12 point.

13 MR. RICH: Your Honor, so that I understand  
14 Mr. Cohn's concession, is he conceding --

15 MR. COHN: I do not think it is a concession.  
16 It is a stipulation.

17 THE COURT: It is a stipulation, and it is  
18 perfectly plain. The scheduling which you submitted  
19 in Mr. Straus' letter earlier is correct as to the break-  
20 down.

21 MR. RICH: Yes.

22 THE COURT: And as far as the question, it is  
23 simply a question of law for me whether the setoff cross  
24 collateral is allowed, and that is all the evidence we need  
25 on that point.



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2 Let us go to the next one.

3 MR. RICH: With regard to Item No. 18 --

4 (examining).

5 THE COURT: I do not think we need anything on  
6 that.

7 MR. RICH: That is why I am checking it, your  
8 Honor. There might be some other points.

9 MR. COHN: Your Honor, I think on this, about  
10 the free records, I do not think there is any contention  
11 that there is any backup material.

12 THE COURT: Just give me a second on this.

13 I do not think we need anything on it.

14 It is on page 174 of the transcript of June 5th,  
15 and the claim as stated there is "on the so-called 1000  
16 series of 45 rpm records there were quantities of records  
17 which were manufactured and sold and later returned.  
18 It is stipulated that these records were indeed returned  
19 and were not resold".

20 The only issue there is the issue, the basic  
21 issue of whether they are entitled to royalties on  
22 records manufactured or manufactured and sold. You  
23 need no other proof on that.

24 MR. COHN: Yes.

25 THE COURT: Okay.